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# Decisions July 79

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1979] OLRB REP.**

Selected decisions of particular reference value are  
also reported in *Canadian Labour Relations Boards  
Reports*, Butterworth & Co., Toronto.







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**1391-78-M** International Union of Elevator Constructors, Local 90.  
(Applicant), v. **Beckett Elevator Company Limited**, (Respondent).

Section 112a – Local area practices different under identical collective agreement language  
– provincial agreement not referring to local practices – whether local practice overriding agreement  
language

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and P. J. O’Keeffe.

**APPEARANCES:** *Stanley Simpson and Paul Lomas for the applicant and Ross R. Dunsmore, Ian Saint and Alan Hopkirk for the respondent.*

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE;** July 9, 1979

1. The applicant has referred to the Board a grievance concerning the interpretation, application or alleged violation of a collective agreement for final and binding arbitration. It is a referral made under section 112a of *The Labour Relations Act*.

2. The applicant alleges that the respondent has violated the current collective agreement to which the applicant and the respondent are bound. The applicant alleges that the respondent has failed to reimburse the grievor, Clarence MacQueen, for the use of his personal vehicle and, in so refusing, has violated clause 12.04.01 of the collective agreement.

3. The applicant and the respondent are each bound to a collective agreement, entitled Ontario Provincial Agreement (“the Agreement”), between the National Elevator and Escalator Association (“the Association”) and The International Union of Elevator Constructors (“the Union”). The Agreement was signed August 7, 1978. It is a provincial agreement within the meaning of section 125(e) of the Act insofar as it applies to the industrial, commercial and institutional sector of the construction industry, with the Association being the designated employer bargaining agency for the respondent and other employers bound by the Agreement and the Union being the designated employee bargaining agency for the applicant and for the Union’s Local 50 and Local 96. The applicant’s geographic jurisdiction includes the City of Hamilton and vicinity plus certain other cities in southwestern Ontario; Local 50’s is Toronto and vicinity and Local 96’s is Ottawa and vicinity.

4. The grievance specifically stated is that MacQueen used his personal vehicle to travel from his residence to his place of work at a construction site in Nanticoke, Ontario, where he was employed by the respondent in construction work as defined in the Agreement. He has claimed and been paid for the travelling time involved as provided in clause 12.05.02(b), *infra*. His claim has been rejected, however, for reimbursement at the rate of twenty-five (25) cents per mile for each day that he used his car for the aforementioned purpose on and after September 13, 1978, calculated on the return mileage between Hamilton City Hall and the job site. The applicant alleges that reimbursement as claimed is due under clause 12.04.01 of Article 12 – Travelling Time and Expenses of the Agreement. The clause reads as follows:

“12.04.01 Transportation



The method of transportation from job to job during regular hours, overtime hours or travelling time authorized by the Employer, shall be that for which the Employer will accept responsibility and give monetary recognition. It is agreed that, when employees agree to use their personal vehicles for transportation as outlined in this provision, they shall be reimbursed at the rate of twenty-five (.25) cents per mile.

The Employer shall also assume the cost of the difference between the employee's own standard insurance and necessary business insurance.

It is understood that there will be no geographical restrictions on the use of personal or company vehicles. Employees will not be required to carry material other than their own personal tools in their personal vehicles."

5. Other relevant portions of the Agreement read as follows:

"Article 7 – Construction Work

7.01 Construction work is hereby defined as erecting and assembling of apparatus as enumerated in Article 4 of this Agreement, except general repairs and modernization as defined in Article 8.02 and 8.05. It is hereby agreed that all Construction work as above defined shall be performed exclusively by Elevator Constructor Mechanics and Helpers.

7.02 It is agreed that the regular working day shall consist of eight (8) hours, between 8 a.m. and 5 p.m. five (5) days per week, Monday to Friday, inclusive. (The above working hours may be changed by mutual agreement as provided in Article 23)

7.03 Work performed on Construction work on a Saturday and a Sunday and before 8 a.m. and after 5 p.m. on Monday to Friday, inclusive, shall be classed as overtime and paid for at double the rate of single time.

Article 9 – Contract Service

9.08.06 Travel time from home to job and from job to home on an overtime call-back (starting after regular working hours and terminating before start of regular working hours) shall be paid for at the same overtime rate applying to the work. Travel expenses on an overtime call back shall be as agreed in Article 12,

When consecutive overtime call-backs occur, the employee shall receive the applicable overtime rate and travel expenses from home to job, from that job to one (1) or more other jobs and then back home.

An employee called out before the regular working hours shall re-

ceive the applicable travel time and travel expenses from home to job. (Exception: an Employer may call and instruct an employee to report to any given job at 8 a.m. on his route in the primary.)

When a call-back made during regular working hours extends into overtime and the employee is authorized to continue work, he shall receive the applicable travel time and travel expense home.

## Article 12 – Travelling Time and Expenses

### 12.05 Travel Zones and Times Within the Primary and Secondary Jurisdictions

#### 12.05.02 Local 90 – Hamilton

(a) Anything over one city bus fare within the primary jurisdiction must be paid by the Employer at the rate of one (\$1.00) per day per man.

(b) Travel zones and travelling times within the secondary jurisdiction with the City Hall as the central point, shall be as follows:-

From the primary to 7  $\frac{3}{4}$  miles –  $\frac{1}{4}$  hour each way  
 from 7  $\frac{3}{4}$  miles to 10 miles –  $\frac{1}{2}$  hour each way  
 from 10 miles to 15 miles –  $\frac{3}{4}$  hour each way  
 from 15 miles to 25 miles – 1 hour each way  
 from 25 miles to 35 miles – 1  $\frac{1}{4}$  hour each way

It is understood that the employees will start work at the jobsite in the respective zones at eight (8.00) a.m. and shall work eight hours per day on their jobsite.

## Article 15 – Jurisdictional Territory

15.01 The primary jurisdiction of any Local Union shall include only that territory in which its members will agree to travel on their own time.

15.02 The secondary jurisdiction of any Local Union shall include the balance of territory beyond the primary jurisdiction and within the boundaries as outlined hereunder.

15.05 The primary jurisdiction of Local 90 of the City of Hamilton, shall include the territory within the area bounded as follows:

Starting at the Queen Elizabeth Way and Grays Road, south on Grays Road to the base of the mountain and continuing on the Old Water Tower Road to Highway No. 20, and on to Highway No. 53. Then west on Highway No. 53 to Nebo Road, then south to Twenty Road, and west to Townline Road in a line to Fiddlers Green Road

and then from Fiddlers Green Road via Lovers Lane to Mineral Springs, and from Mineral Springs to a line connecting with Brock Road. Then north-east on Highway No. 5 via Kerns Road to the Queen Elizabeth Way. From the Queen Elizabeth Way to Brant Street and on to the Lakeshore, then along the Lakeshore to the starting point.

15.06 The secondary jurisdiction of Local 90 shall be within a radius of thirty-five (35) miles from the City Hall and shall include in addition the towns or cities of Port Colborne, Niagara Falls, Fort Erie, and Waterloo.

#### Article 23 – Local Option

23.01 It is agreed between the Employers and the Unions that for the benefit of the entire elevator industry, it is permissible for any Local Union to negotiate special conditions with an Employer for the following classes of work, except that the wage rates as determined by Article 5 of this Agreement cannot be changed.

1. Modernization work
2. General repairs
3. Contract service
4. Construction work

Special conditions include, but are not restricted to such items as shift work, working hours on repairs, contract service, modernization and construction work.

23.02 These special conditions shall be determined by a Committee consisting of two (2) representatives from the Local Union, one (1) International Representative, and three (3) representatives from the Employers and their decision shall be binding on both parties.

23.03 Agreement on special conditions shall continue as long as satisfactory to both parties, but no change shall be made more often than every six (6) months. Sixty (60) days' notice in writing shall be given by one party to the other of a desire of such a change, and such written notice shall constitute cause for a meeting between the parties."

6. The grievor's claim is for payment for use of his personal vehicle during travelling time to his place of work in that band of the secondary jurisdiction described in clause 12.05.02(b) as falling within radii of 25 miles and 35 miles from the Hamilton City Hall. Counsel for the applicant argued that the first sentence of clause 12.04.01 should be applied to this situation by reading it as "The method of transportation ... during ... travelling time authorized by the Employer ..., shall be that for which the Employer will accept responsibility and give monetary recognition.". Thus, since the employee was using his personal vehicle during travelling time, he is entitled to the mileage payment set out in the second sentence of the same clause. Such a reading, of course, ignores the words "from job to job" and it would be grammatically correct only if those words modified the words "regular hours" and



“overtime hours” also deleted by that reading. In the Board’s view, the sentence cannot be read in any sensible manner so as to have the words “from job to job” modify the other missing words. The structure of the first sentence of the clause may be awkward, but its meaning is clear. The words “from job to job” modify the words “method of transportation”, so it is the method of transportation used by an employee to go from job to job during regular hours, overtime hours or travelling time for which the employer will “give monetary recognition”. When an employee agrees to use his personal vehicle as the method of transportation from job to job, the payment described in the second sentence of clause 12.04.01 will be activated, but not when the employee uses his personal vehicle for transportation from home to job or job to home, except under conditions referred to in the following paragraph.

7. The application of clause 12.04.01 solely to transportation from job to job finds support elsewhere in the Agreement. The Agreement covers, in addition to construction work, repair work and contract service work. Contract service work is described in Article 9 and in clause 9.08.06, *supra*, which deals with the payment of travel time and travel expenses during overtime call-back, the parties to the Agreement have seen need to make specific reference to payment for time and expense to cover travel from home to job and job to home. The several references to travel expenses contained in the clause would, in the Board’s view, be redundant if transportation expenses from home to job and job to home were covered by clause 12.04.01.

8. The applicant also offered the alternative argument, should the Board not agree with its reading of clause 12.04.01, that the clause contains a latent ambiguity and should be interpreted in keeping with the established past practice of the parties and the intent of the parties to continue these practices under the Agreement. The Board, as a result, heard extrinsic evidence as to past practice, negotiation of the Agreement and discussion between representatives of the parties to the Agreement in post-negotiation meetings. The Board found this evidence of no assistance to it in resolving the issue since it reveals two totally divergent past practices under agreement language which, for all practical purposes, is the same as clause 12.04.01. Several employers, including the respondent, under the prior collective agreement did pay mileage expenses in the manner claimed in the subject grievance insofar as the applicant’s jurisdiction is concerned. On the other hand, it is undisputed between the parties to the hearing that it was the practice in Local 50’s jurisdiction not to pay mileage in the same circumstances. There was limited evidence on the practice in Local 96’s jurisdiction, but it supports reasonably the inference that it was the same as Local 50. The Agreement contains no provision of either a general or specific nature that would ensure the continuation of a past practice or benefit not explicitly contained in the language of the Agreement. Moreover, there are a number of clauses which apply only to one or another of the three locals, including clause 23.04 of the Agreement which protects a local option for Local 50 under the protective umbrella of Article 23 – Local Option. There is no doubt, however, that clause 12.04.01 is anything but a clause of general application to be applied uniformly to the parties bound by the Agreement.

9. In consideration of all of the foregoing, we find that the respondent has not violated the Agreement by refusing to pay to the grievor the mileage expenses which he is claiming for the use of his personal vehicle. In the result, the grievance fails and is dismissed.

**DECISION OF BOARD MEMBER, P. J. O'KEEFE:**

1. I have reviewed the decision of the majority in this matter and dissent therefrom.
2. The facts set out in the majority decision are substantially correct.
3. It is uncontradicted evidence that the respondent employer has paid mileage expenses under an identical provision in a local agreement for almost twenty years in the Hamilton Area. When there was a dispute between the Respondent and the Union over payment on the same wording, the respondent employer subsequently agreed that it would pay the mileage expenses under the provision. This means that the only change in interpretation of identical words by the parties to the agreement must come from the new provincial collective agreement. There is no change in the wording in the new collective agreement with respect to the Hamilton area relative to mileage expense.
4. It seems abundantly clear from the agreement that an ambiguity is set up in the wording contained in article 12.04.01 in that "from job to job" cannot and never did modify the phrase "travelling time authorized by the employer". 12.05.02 defines travelling time with respect to Local 90 Hamilton as being from the City Hall to the job site and return. It is uncontradicted evidence that the respondent employer continued to pay for this very travelling time pursuant to 12.05.02 and that amount is not and never was in dispute. Accordingly, since travelling time is time spent travelling from home to job and from job to home, it would be impossible for the phrase "from job to job" to take place during the time frame of travelling time authorized by the employer as it is found in article 12.04.01. The ambiguity can only be resolved by interpreting the agreement so that it makes sense and that all the words used in the article can be given a meaning. If from job to job simply modifies the method of transportation, then the phrase "travelling time authorized by the employer" has no meaning.
5. In my opinion, the majority decision has read out this phrase from article 12.04.01, which is something arbitrators are prohibited from doing.
6. The alternative interpretation of the clause to avoid and to resolve the ambiguity would be to determine that from job to job modifies only the time frames of regular hours and overtime hours and that the word "or" as it appears in front of "travelling time authorized by the employer" is disjunctive and intended to separate that time frame from the others so that the phrase reads "the method of transportation during travelling time authorized by the employer shall be ...".
7. The majority decision refers to the fact that evidence of negotiations did not resolve the conflict. Evidence of negotiations which was led by the respondent employer not the applicant union, indicated that for almost twenty years, the union members of Local 90 in the Hamilton area had been paid mileage expenses pursuant to identical wording in article 12.04.01 without exception and that when there was a dispute in times past with this very employer over the meaning of that phrase, it was resolved in favour of the union. I do not know of any more strong or compelling evidence of past practice explaining an ambiguity in the agreement. The dispute surfaced prior to negotiation of the new provincial agreement based on the same words in the prior local agreement. It was also uncontradicted evidence from the respondent employer's witnesses who were responsible for negotiating the agree-

ment that they were under no instructions to change the mileage expense for the Hamilton area and that after negotiations, when the agreement was completed, they did not advise anyone that the mileage expense had been changed in the Hamilton area. The applicant union's witness gave evidence of negotiations and confirmed this. Again, I do not know of any stronger or more compelling evidence of negotiations which would help to resolve an ambiguity.

8. The majority have referred to the facts that similar words in the Toronto area have not produced payment for mileage expense. However, in my opinion, what the majority have neglected to consider is that fact that under the present provincial agreement, the following clause appears relative only to Toronto.

“12.05.01 (d) – In the area between the present Metro boundaries and the limit of a forty mile radius from the City Hall, Toronto, each employee assigned to work in the area shall be reimbursed for 45 minutes each way, per day worked, *as a total expense remuneration.*” [emphasis added]

What clearer indication could there be in a provincial agreement that travel expenses are different in Hamilton than they are in Toronto since 12.05.01 (d) does not appear in 12.04.02, Local 90 – Hamilton. In the local agreement affecting the Toronto area prior to the provincial agreement (Exhibit 10) the following clause appears, which does not appear in the Hamilton local agreement prior to the provincial agreement:

“Travel expense area

A travel expense of \$18.00 per man per day worked shall be paid in an area bounded by Metro limits in a radius of forty miles from Toronto City Hall. It is agreed that the Town of Bowmanville is within this area.”

9. It is abundantly clear from the collective agreement as a whole that there are local differences within each area relating to travel zones, times and expenses. Hence, the first clause, entitled “Transportation” is followed by specific individual clauses dealing with Toronto, Hamilton and Ottawa. The majority of the Board have ignored what is obvious in the collective agreement and that there is to be a difference in each area covered by the agreement. The evidence clearly establishes that there was an attempt to bring all three local agreements under one cover but not to change them. The practice in the Hamilton area had been to pay mileage expenses for twenty years on identical words. The applicant union could expect that the repetition of those same words in a Provincial agreement would assure the continued payment of mileage expenses.

10. In my opinion, the majority decision ignored the evidence that all parties to this agreement anticipated that mileage expenses would be paid in the Hamilton area. There is evidence that all jobs bid after the provincial agreement included allowance for mileage expense and mileage expense was paid by all other employers in the area after the new provincial agreement was signed. The majority decision runs completely counter to the very intentions of the parties under the agreement.



11. In my opinion, the majority is also wrong in law in looking at practice in the Toronto area to determine intent in the Hamilton area and then saying the practice is contradictory.

12. The respondent employer through its counsel conceded at the hearing that if the employer authorized a personal vehicle to be used under article 12.04.01 it would have to pay mileage expense. How is it then possible for the employer to say that mileage expense is not payable during travelling time authorized by the employer under this clause. This concession by the employer's counsel highlights the contradictory approach taken by the employer in its argument to the Board. It also is evidence of the real intent of the employer to accept mileage expense in the Hamilton area when it authorizes the use of a personal motor vehicle during travelling time.

13. For all these reasons I would have allowed the grievance.

14. I am most concerned with the majority approach to interpretation of this provincial agreement – the majority has, in my opinion, by its decision, run against the plain intention of the parties as expressed in the agreement and uncontradicted past practice of a benefit which the union had in the Hamilton area for twenty years. Both the employer and union negotiators have said there was no mutual or unilateral intent to change the payment of mileage expense in the Hamilton area in the new agreement. The majority by its decision, has ruled against the very intent of the parties. Such an approach can only weaken collective bargaining in this industry and bring disrepute to the arbitration process.

**2164-78-R Canadian Union of Industrial Employees, (Applicant) v. Bermay Corporation Limited, (Respondent) v. Goldcrest Furniture Ltd. (Intervener)**

**Sale of a Business – Purchases acquiring physical assets and employees of union business – Intermingling with non-union employees – vote ordered.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and D. B. Archer.

**APPEARANCES:** *M. Swenarchuk, P. Dorfman, M. Hurde for the Applicant; D. Brisbin, Wm. Nathanson, B. Nathanson, for the Respondent; I. C. Welsh for the Intervener.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER:** July 12, 1979

1. This is an application under section 55 of *The Labour Relations Act*. The applicant alleges that the respondent Bermay Corporation Limited purchased the business of the intervener Goldcrest Furniture Limited and seeks a declaration that the respondent is bound by the collective agreement between itself and Goldcrest.

2. The respondent is a furniture manufacturer and is engaged principally in the production of sofa beds marketed in Ontario under the name of Sealy Mattresses Limited. A

small percentage of its production includes the making of matching chairs and ottomans. The respondent's enterprise has prospered and during the five years between 1973 and 1978 its business increased more than five fold. During that time it doubled the number of its production employees. In mid-1978 the respondent found its production falling behind the demand for its product and decided to move to production facilities larger than those which it then had at 3719 Chesswood Drive, in Downsview.

3. Over the next six months it considered a number of plant site alternatives. Finally, in December of 1978, it learned that the intervener was going out of business and the premises which it occupied at 920 Caledonia Road, Toronto, would become available upon the expiry of the intervener's lease on March 31, 1979. The intervener's plant on Caledonia Road was ideal for the respondent both from the standpoint of size and of location.

4. The respondent then entered into negotiations with both the landlord of those premises and the outgoing tenant, the intervener Goldcrest Furniture Limited. As a result of those negotiations the respondent obtained a ten year lease of the premises from its owner, 920 Caledonia Investments. It also purchased from the intervener virtually all of the fixed assets and raw materials in its possession at 920 Caledonia Road. The respondent further entered into an assignment of the lease held by the intervener for the period from January 31, 1979 to March 31, 1979. In fact, Bermay entered into possession of the premises previously occupied by Goldcrest on February 3, 1979.

5. At that time, for the purchase price of \$75,000.00 Bermay came into possession of a substantial amount of capital assets and raw materials. It acquired all of the foam and yard goods in the possession of the intervener; it also acquired all of the intervener's 50 sewing machines, its cutting tables, its chipfoam tank, its racking and, with a few exceptions, virtually all of the equipment and tools which Goldcrest had used to manufacture furniture.

6. This was a profitable arrangement for the respondent. By its own evidence the replacement cost for the equipment acquired would have been close to \$250,000.00 and if the same goods were purchased at auction they might have cost well in excess of \$100,000.00. The respondent derived further advantage from the fact that the equipment which it took over from Goldcrest was already in place so that it had little or no need to make physical improvements to the premises such as installing wiring or mounting new equipment.

7. As Mr. William S. Nathanson, the owner of the respondent company, put it in his testimony, a "friendly deal" was made overall with the intervener Goldcrest Furniture Limited. The evidence establishes that during the first weeks of Bermay's operations at 920 Caledonia Road it did a substantial amount of work on behalf of the intervener. This consisted primarily in producing furniture for Goldcrest in order to allow it to fill its outstanding orders before going out of business. Thus, for a period of six weeks, one third of the production capacity of the respondent was devoted to producing, at cost, products for Goldcrest Furniture Limited.

8. During that period, and to the present time, Goldcrest continued a separate aspect of its operations in an adjacent plant. Several members of Goldcrest personnel were loaned to the respondent during the six week period in order to train the staff of Bermay in the production of the Goldcrest products. Another example of the friendly relationship between the two companies during that period was the lending by Goldcrest to Bermay of the

use of its button-making machine in the adjacent plant at no apparent cost. The whole of the evidence discloses a smooth transition of the premises at 920 Caledonia Road to the mutual advantage of both Bermay and Goldcrest.

9. The Board heard considerable evidence about the differences in the quality and style of product originally produced on the premises by Goldcrest and now being produced by the respondent. Like Bermay, Goldcrest had been engaged largely in the production of sofa beds. Its products were directed to what the respondent described as the middle to lower range of the market while the respondent's Sealy brand products are more oriented to the middle to upper range of the sofa bed market. Thus upon taking over, Bermay did not purchase any of the Goldcrest work in progress nor did it acquire any of the sofa bed material owned by Goldcrest. However, as part of the arrangement to produce Goldcrest products in the transition period, it did make use of those materials.

10. The issue to be determined is the legal effect of the foregoing transactions upon the rights of the employees of Goldcrest and their union. Prior to the takeover of the premises by Bermay the intervener Goldcrest had some seventy production employees all of whom were represented for collective bargaining purposes by the applicant. The applicant and Goldcrest Furniture Limited were parties to a collective agreement which commenced February 27, 1978 and was due to expire March 1, 1980. On November 20, 1978 Goldcrest posted the following notice to all of its employees at 920 Caledonia Road in Toronto:

"In accordance with the Employment Standards Act of Ontario, notice is hereby given that your employment with Goldcrest Furniture Ltd., will be terminated on or after January 22, 1979 due to the intended sale or closure of the company's Upholstery business by March 2, 1979.

It is intended that production will continue and that work will continue to be available for the majority of employees following expiry of the eight weeks notice of termination until sale or closure of the business on March 2, 1979."

11. While Goldcrest projected March 2, 1979 as the date for the termination of its business it in fact ceased production by February 3, 1979. Prior to that time the respondent company circulated application forms for employment among all of the production employees of Goldcrest. Some forty of the Goldcrest employees at 920 Caledonia Road filled out the forms and eventually twenty-four of them continued as employees of Bermay. The respondent also hired two of the five production supervisors formerly employed by Goldcrest as well as its office foreman. In addition to employing the twenty-four Goldcrest employees the respondent transferred all of its twenty six production employees from its former premises on Chesswood Drive. It also hired twenty new employees. The evidence establishes that the seventy production employees now working for the respondent at 920 Caledonia Road all work together without any distinction as to whether they were former Goldcrest employees, former employees of the respondent on Chesswood Drive, or are newly hired employees.

12. In assessing the impact of a commercial transaction for the purposes of section 55 of *The Labour Relations Act* the Board must inevitably take into consideration a great number of factors in making its determination whether there has been a transfer of a business. In



*Culverhouse Foods Limited* [1976] OLRB Rep. Nov. 691 the Board, at page 697, summarized its approach as follows:

“In each case the decisive question is whether or not there is a continuation of the business ... The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction ... the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or nonexistence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it was before, i.e. whether there has been a continuation of the business.”

13. In this case there has been no transfer of goodwill; it is clear that the retail customers of Bermay are not the same customers that were serviced by Goldcrest. It is also true that Bermay did not take over any work which was in the course of production at the time of its move into the premises on Caledonia Drive. And while there is some evidence that Bermay has produced a small number of items in furniture styles which were previously produced by Goldcrest little weight can be given to that fact in view of the unchallenged evidence that the pirating of furniture designs is a common practice in the industry. Nor does the Board place much reliance upon the fact that Bermay performed certain work on a contract basis in order to assist Goldcrest in completing its contract commitments. While it is true that that work was done on terms advantageous to Goldcrest it serves only to establish that Bermay and Goldcrest pursued a mutually favourable arrangement for the transfer of the premises.

14. The critical issue in this application is whether the transfer of the premises and of other assets is all that occurred or whether all of the facts taken together establish the transfer of a business for the purposes of the Act. The concept of the transfer or sale of a business is broadly defined within section 55(1) of the Act which provides:

“55(1) In this section,



- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.”

15. The purpose of the section is to protect bargaining rights vested in a group of employees and their union when there has been a transfer of a business or part of a business in which they are employed. In making a determination under section 55 the Board must scrutinize, with a view to the employment relationships affected, the substance and not merely the form of the transaction. Thus the criteria for determining whether there has been a sale or transfer of a business for the purposes of *The Labour Relations Act* are necessarily broader than the traditional standards that might be required to establish the sale of a business for commercial or tax purposes. Even though there may be no covenant restricting a predecessor's right to compete in the same business field, even though there may not have been a transfer of goodwill, or the transfer of a business name, product names or brand names, or the transfer of customers, customer accounts or of work in progress there may nevertheless be a transfer of enough significant components of an enterprise to establish the sale of a business or of part of a business for the purposes of section 55 of *The Labour Relations Act* (See, *Thorco Manufacturing Ltd.* 65 CLC ¶16,052; *Kem's Masonry* [1964] OLRB Rep. Dec. 470; *L & M Food Market* [1965] OLRB Sept. 440; *Borden Co. Ltd.* [1970] OLRB Rep. Jan. 1244; *Automatic Fuels Ltd.* [1972] OLRB Rep. May 515; *Canac Shock Absorbers* [1973] OLRB Rep. Oct. 508; *Thunder Bay Ambulance Service Inc.* [1978] OLRB Rep. May 467).

16. When the replacement of one undertaking by another is marked by a continuity of production and sales in the same area of endeavour, out of the same location using the same physical equipment and human resources to do the same kind of work, the Board may conclude that there has been the sale of a business. In this instance the premises at 920 Caledonia Drive previously occupied by Goldcrest for the purpose of manufacturing furniture are now occupied by Bermay for the purpose of manufacturing the same kind of furniture. There was virtually no hiatus in production save for a few days' adjustment period to change over from the manufacture of Goldcrest products to the manufacture of Sealy products. At the time of the transfer the equipment and raw materials used by both companies was substantially the same and a number of the employees and production supervisors used by both companies was and continues to be the same. In substance the respondent has taken over an essential part of its predecessor's business – its production capacity and location. While the respondent did not acquire its predecessor's name, goodwill or customers, it nevertheless acquired both capital and human resources which were an intrinsic part of the business of Goldcrest Furniture Limited. From the standpoint of a production employee very little has changed; a worker who continues to work in the same location on the same machinery using the same skills to make the same kind of materials into the same kind of product could not be faulted for concluding that the business in which he continues to work has been transferred from one employer to another. In the light of all of the foregoing the Board therefore finds that the transactions in question constitute the transfer of part of the predecessor's business within the meaning of section 55 of *The Labour Relations Act*.

17. That finding, however, does not dispose of the matter. In this case the respondent has some 70 production employees, 24 of whom were represented for collective bargaining purposes by the applicant under the predecessor employer. While Section 55 of the Act op-

erates to protect the bargaining rights of those employees and their union it also provides a mechanism to balance their interest with the interest of the respondent's former employees and new employees who work side by side with them. Section 55(6) of *The Labour Relations Act* provides as follows:

- “(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,
- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
  - (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
  - (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
  - (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.”

18. An obvious concern in the resolution of the conflict that arises upon the intermingling of employees who have previously been organized with employees who were previously not organized is the interest of the employer to have its industrial relations conducted within the framework of a rational bargaining structure. In this case, the Board is satisfied that it would be contrary to the interests of the employer and of the employees as a group to segregate the former employees of Goldcrest into a vestigial bargaining unit that would exclude all other production employees. It would, in our view, be equally inappropriate to effectively grant the bargaining rights for the two thirds of the production employees who have not previously been organized to the applicant without any indication of the wishes of that majority group. The Board is therefore satisfied that it should in these circumstances describe the appropriate bargaining unit and exercise its discretion under section 55(8) of *The Labour Relations Act* to conduct a representation vote among all of the employees in the bargaining unit.

19. The Board therefore finds that all production employees of the respondent in its furniture division at Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period constitute a unit of employees appropriate for collective bargaining.

20. The Board directs that a representation vote be taken of the employees in the bargaining unit. The bargaining unit as described above shall comprise the voting constituency

and all employees of the respondent in the voting constituency on the date hereof, who have not voluntarily terminated their employment or who have not been discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

21. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
22. The matter is referred to the Registrar.

**DECISION OF BOARD MEMBER J. D. BELL:**

1. I do not agree that the transactions outlined in the majority decision constitute the transfer of part of the predecessor's business within the meaning of section 55 of *The Labour Relations Act*.
2. What has occurred here is not an acquisition of part of Goldcrest business but the transfer of a prosperous business of similar nature to a new location previously occupied by the now defunct part of Goldcrest. The Bermay business has merely acquired some available assets and draws no vitality from Goldcrest.
3. I would therefore dismiss this application.

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**0219-79-U; 0220-79-U** Canadian Paperworkers Union and Holland Landing Local 1150 of the Canadian Paperworkers Union, (Applicants), v. **Cameron Packaging Inc.** and Hugh T. Cameron, (Respondents).

**Arbitration – Consent to Prosecute – Lock-Out – claim for damages arising out of unlawful lock-out – section 84 considered – Board refusing consent to prosecute – purpose of prosecution reviewed**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *H. P. Rolph, J. P. Gallie, H. Arts and D. Holledge, for the applicants; G. Grossman for the respondents.*

**DECISION OF THE BOARD;** July 5, 1979

1. The name "Cameron Packaging Incorporated" appearing in the style of cause of this application as the name of one of the respondents is amended to read: "Cameron Packaging Inc."
2. The Board directs that the above applications be and the same are hereby consolidated.



3. Board file 0219-79-U is an application under section 79 claiming compensation for individual employees affected by an unlawful lockout (declaration of which was made in Board file 0205-79-U) and in which the applicant further alleges contraventions of sections 3, 14, 56, 58, 61, 63(2), 66, 67, 70 and 85 of the Act. Counsel for the parties agreed that the finding of facts in Board file 0205-79-U together with Exhibits filed in that proceeding; and that the applicant would call additional evidence relating to anti-union animus. The relief sought by the applicant is damages for the period of the unlawful lockout and as aggravated by the further complained of contraventions of the Act. Board file 0220-79-U is an application for Consent to Prosecute. The statement of particulars in both files is the same.

4. The Board declined to entertain the application under section 79 and deferred to grievance arbitration. On the request of Counsel for the applicant we now provide written reasons for our decision.

5. The respondent took the preliminary position that the claim for damages is one which should be settled through grievance arbitration and should not be entertained by this Board. The Board refused a request by the applicant to call evidence on this preliminary objection prior to making argument.

6. It was the applicant's position that the Board's jurisprudence established that, where the basis of the complaint is one which is founded on a contravention of the Act, and which is central to the entire bargaining structure, issues are raised which cannot be effectively dealt with by an Arbitration Board and this Board is the appropriate forum. The applicant argues that it is the contravention of the Act which is pre-eminent, that contract arbitration is a slow and expensive forum and that an untimely resolution, no matter how favourable militates against the applicant. The applicant also argues that Section 84 of the Act must be very narrowly interpreted since the 1975 legislative amendment to Section 79 broadening access to the Board's remedial relief.

7. We agree with the most recent statement of the Board in respect to the state of the jurisprudence on this subject as expressed in the *Booth Avenue Hospital* case, [1979] OLRB Rep. Jan. 7, where it quotes with approval from the *County of Middlesex* case [1976] OLRB Rep. Aug. 427 as follows:

"Where an alleged unfair labour practice also constitutes at the same time an alleged breach of a collective agreement, the Board has generally chosen to exercise its discretion under Section 79 of the Act, and defer the matter to grievance arbitration ... However, in circumstances where the arbitration process is 'clearly unavailable or unsuitable to resolving the issue', the Board will depart from its general practice and will itself hear the matter."

and further:

"Section 37 of the Act dictates that issues concerning the interpretation, administration or alleged violation of a collective agreement must be determined by a Board of Arbitration. If the Board were to regularly entertain complaints which might otherwise be arbitrated it would undermine its Act ..."



8. In the instant case, the applicant did on April 30, 1979 file a grievance alleging a contract violation and which grievance was explicitly made subject to the right of the Union to seek similar and further relief, and the present application was filed on May 1, 1979. Counsel for the respondent stipulated that it does not take any objection but that the grievance was properly filed under the contract and that it would take no technical objection to its being heard by a Board of Arbitration.

9. It is patent that the arbitral remedy is available, and the only other question before the Board is whether it is "unsuitable" in the instant case.

10. The Board has already dealt with the contravention of the statute in this matter (Board file 0205-79-U) and the basic matter which the present application seeks to have dealt with is the assessment of damages which it alleges have been aggravated because of the respondent's alleged conduct which constituted contraventions of other sections of the Act. We see no reason why any facts alleged to be cogent reasons for extending damages beyond May 10th, 1979 when the unlawful lockout matured into a lawful lockout cannot be fully assessed by a Board of Arbitration. In our view, Section 84(1) of the Act which reads:

"Where the Board declares that a trade union or council of trade unions has called or authorized an unlawful strike or that an employer or employers' organization has called or authorized an unlawful lock-out and no collective agreement is in operation between the trade union or council of trade unions and the employer or employers' organization, as the case may be, the trade union or council of trade unions or employer or employers' organization may, within fifteen days of the release of the Board's declaration, but not thereafter, notify the employer or employers' organization or trade union or council of trade unions, as the case may be, in writing of its intention to claim damages for the unlawful strike or lock-out, and the notice shall contain the name of its appointee to an arbitration board."

clearly sets out the legislative intention that while this Board is vested with the jurisdiction of making a declaration of an unlawful lockout that the claim for damages is one which is best dealt with by a Board of Arbitration.

11. It may be that Section 84 was not meant to apply to a case such as the present where the unlawful lockout commenced while the collective agreement was still in force, and a grievance filed during such period: nonetheless, the legislative intent is clear that the suitable forum for assessment of damages arising out of a lockout is a Board of Arbitration and not this Board, and Section 84 provided a remedy in cases where it was not already available by virtue of an existing collective agreement. Nor are we persuaded by the legislative history urged by the applicant that the effect of the 1975 amendment to Section 79 was largely, in this area, to nullify the intent behind Section 84: The legislature has not said so and the Act must continue to be read as a whole.

12. The applicant in Board file 0220-79-U based on an identical statement of particulars to the above file sought Consent to Prosecute which the Board refused to grant. At the request of the applicant, the Board now provides written reasons for its decision, and notes that the applicant was not given an opportunity to call additional evidence.

13. The leading case, dealing with the exercise of the Board's discretion, in cases such as this is *A.A.S. Telecommunications*, [1976] OLRB Rep. Dec. 751 in which the Board said at page 760:

"... The nature of this discretion has been thoroughly canvassed in a recent decision of the Board, *Arthur G. McKee & Company Canada Ltd.* [1976] OLRB Rep. Oct. 637. The authorities cited in that decision establish that the discretion is a screening device which serves two purposes. One purpose of the discretion is to prevent the bringing of vexatious prosecutions. This purpose is reflected in the requirement that an applicant make out a prima facie case or raise an arguable point of law. A second purpose, and a more important one, is to insulate the industrial relations process from the criminal process. Hence, the Board, in addition to requiring an applicant to make out a prima facie case or raise an arguable point of law, must also be convinced that a prosecution would be consistent with both the promotion of good industrial relations between the parties, and the general conduct of industrial relations in the Province.

In this case, the applicant has clearly made out a prima facie case and has raised arguable points of law. These issues of fact and law, however, have been dealt with in a comprehensive fashion by this Board. The conduct that would be the subject of the prosecution, if the consent is granted, is the very conduct that has been considered by this Board, and for which a remedy has been granted ..."

14. It is obvious that the applicant, by virtue of the Board's decision in file 0205-79-U, has passed the first threshold purpose to be considered in respect to an exercise of our discretion, i.e. that there is a prima facie case in respect to a contravention of Section 63(2) of the Act. Based on the particulars filed by the applicant, it is evident to us that certain of the facts giving rise to the finding of a Section 63(2) contravention also establish prima facie evidence of contraventions of some other sections of the Act. Certainly, in our view the unlawful lockout by the employer is the central factor in issue and that has already been dealt with in a comprehensive fashion by the Board, and the other contraventions are inter-related to and intermingled with that central issue. Under such circumstances, the Board must consider whether it would exercise its discretion even assuming that prima facie contraventions of other sections of the Act were established.

15. We were informed by Counsel that since the Board decision of May 14th there has been one direct negotiating meeting and that mediation services have been used. The applicant argued that the Board should exercise its discretion to encourage respect for the law and to deter further untoward conduct. We believe that the declaratory decision already made has forcefully established the employer's legal obligations. A further criminal prosecution in this case which, if successful would result in the imposition of monetary fines on the respondents would accomplish nothing insofar as resolution of bargaining issues are concerned, and on the other hand delay the ultimate settlement. There being no sound industrial relations purpose to be served, the Board declines to exercise its discretion to grant Consent to Prosecute.

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**0412-79-U** Randy Hunter, (Complainant), v. International Union-United Automobile, Aerospace, Agricultural Implement Workers of America (U.A.W.) and **Chrysler Canada Ltd.** (Respondents).

**Arbitration – Duty of Fair Representation – whether employee has absolute right to demand arbitration – whether settlement of grievance dispensing with arbitration for future infractions unlawful – allegations against employer alone not founding section 60 violation**

**BEFORE:** G. Gail Brent, Vice-Chairman.

**APPEARANCES:** *John Rossi for the applicant; H. P. Rolph, Gerry Bastien and Ray Lebert for the respondent union, D. W. Brady, L. Bulat and W. Kenny for the respondent company.*

**DECISION OF THE BOARD;** July 31, 1979

1. The complainant has complained that he has been dealt with by the respondents contrary to sections 3, 37 and 60 of The Labour Relations Act and has requested:

- (a) that he be reinstated with full compensation, or in the alternative
- (b) that he be compensated for loss of earnings and other employment benefits.

2. Both the trade union which was certified as bargaining agent for the employees and the employer were named as respondents in this case. For the sake of convenience, the former will be referred to henceforth as the union and the latter as the company.

3. Both the union and the company raised preliminary objections. They both raised an objection concerning the delay between the date the complainant was notified that the matter had been settled by them and the date the complaint was filed. In addition, the company raised objections concerning paragraph 4 sub-paragraphs (b) and (c) of the complaint. Those two sub-paragraphs are reproduced below:

- “(b) The grievor was dealt with by the respondent Chrysler Canada Ltd. contrary to section 3 of the Act in that by imposing paragraph two of the Conditional Reinstatement attached hereto it denied the grievor freedom of choice to participate in the lawful activities of a trade union, which includes the entitlement to Union representation during the term of a collective agreement.
- (c) The grievor was dealt with by the Respondent Chrysler Canada Ltd. contrary to section 37 of the Act in that by imposing the terms of Conditional Reinstatement it in effect was placing the grievor outside the collective agreement in effect and denying him his right to have all matters settled by arbitration.”

Paragraph 2 of the Conditional Reinstatement which is referred to in paragraph 4(b) reads as follows:



“For a period of one year following the date of reinstatement, any violation or infraction of Company rules will result in his discharge without Union representation.”

4. In summary the company has submitted that paragraphs 4(b) and (c) of the complaint should be dismissed because section 3 of the Act is a declaration of rights which does not create an offence and therefore is not an appropriate matter for a section 79 complaint. The company has argued in relation to paragraph 4(c) that it assumes that an employee has an absolute right of proceeding to arbitration for the resolution of his grievance. It is submitted that there is no such right, if there were such a right it would have to be found explicitly in the Act and its violation would have to be an unfair labour practice. In addition, the company has argued that the sort of formula used in paragraph 2 of the Conditional Reinstatement is commonly used in grievance settlements and has been interpreted by labour arbitrators as separating the offence and the penalty so that only the former is arbitrable.

5. In response to these objections the complainant has argued that the delay was not extreme and should only affect the quantum of compensation. It was also argued that the condition attached to the Conditional Reinstatement was improper and contrary to sections 3 and 37. This argument was made relying on *Re United Steelworkers of America, Local 2900 and Inglis Ltd.* (1977), 16 O.R. (2d) 253; 77 D.L.R. (3d) 722 (H.C.). That case dealt with the relationship between the jurisdiction of an arbitrator under section 37(8) of the Act with sections 3 and 56 of the Act. The court held, in essence, that an arbitrator exercising the power to substitute a penalty under section 37(8) cannot ignore the other provisions of the Act which guarantee the right to join and participate in a trade union and which prohibit employee interference in the administration, etc. of a trade union. The arbitrator there had attempted in his award to prohibit the grievor from “acting in a union capacity” for a period of two years from the date of reinstatement.

6. The reasoning in that case does not touch upon the ability of an employer and trade union to agree as a term of reinstatement that an employee must not breach a company rule for a given period or face dismissal “without union representation.” Such a clause clearly does not prohibit the complainant from joining a union or participating in union activities. On its face, it clearly does not deprive the complainant of any rights declared in section 3 of the Act. Accordingly, even if section 3 of the Act gives an employee a right, the violation of which can be the subject matter of a section 79 complaint, there is nothing in the clause before me which would interfere with such a right. However, it is the decision of the Board that the objection raised by counsel for the company that section 3 is declaratory and does not create an offence has merit and must be upheld – see *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714 at 718. Accordingly, the matter raised in paragraph 4(b) of the complaint must be found on its face not to be an appropriate matter for a complaint under section 79 and is dismissed.

7. The Board also agrees with counsel for the company that section 37 of the Act does not give an employee the absolute right to have a grievance determined by a board of arbitration. It has long been recognized that the union has the carriage of the grievance and can determine that it will not proceed to arbitration. The right of the employee under the Act is not to have his particular grievance arbitrated but to have the union act in a manner which is not contrary to section 60. In other words, a violation of section 37 does not constitute an unfair labour practice.



8. In any event, the clause in the Conditional Reinstatement does not on its face contravene section 37 of the Act. It does not preclude access to arbitration, however it would probably preclude the board of arbitration from considering anything other than the question of whether there was "some cause for some discipline", [*Hiram Walker & Sons Ltd.* (1973). 3 L.A.C. (2d) 203 (Adams)]. For all these reasons, in this case the Board does not consider that the matters dealt with in paragraph 4(c) disclose any violation of the Act or any unfair labour practice and the complaint is dismissed with regard to that item.

9. It would also appear from the complaint and argument that paragraph 4 subparagraphs (b) and (c) do not allege any wrongdoing on the part of the union. Moreover, counsel for the complainant stated that the allegations contained therein were no part of the section 60 complaint against the union. For these reasons, and also because logically complaints against the employer alone cannot be considered to be a breach of any section 60 duty, the matters considered above will not be considered in any determination of the complaint regarding an alleged violation of section 60 by the union.

10. Both counsel for the union and for the company argued that the complaint ought to be dismissed because of the delay in bringing the complaint. There was a period of roughly six months between the date the matter first arose and the date the complainant attended at his solicitor's office to sign the complaint. There then followed a period of roughly four months between that and the filing of the complaint. The evidence before me would appear to indicate that a significant part of the initial six month delay may have occurred because of the complainant's attempts to find a solicitor who was able to take his case and his attempts to obtain legal aid. In *C.C.H. Canadian Limited*, [1977] OLRB Rep. June 351, the Board summarized its general policy in the following way at page 352:

"The Board as a general rule will not refuse to entertain a complaint under section 79 only because of delay in lodging the complaint. Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded ..."

The Board then went on to consider the delay in that case to be "extreme" rather than merely "unreasonable" and refused to hear the case in the absence of mitigating circumstances.

11. In this case, the situation is different than the situation in the *C.C.H.* case *supra* which the Board characterized as "extreme". There the allegation was a failure to hire in violation of section 58 of the Act, the onus of proof was on the employer and there had been total silence from both the union and the grievor for over one year. The Board reasoned then that the union was capable of assessing whether there was a violation of the Act at the time of the event and should not be allowed to "sit in the bushes" and wait to bring its complaint. Here the complainant was dissatisfied with the settlement reached, made his dissatisfaction known immediately, and then proceeded to ascertain his legal rights. At most, the delay here might be characterized as unreasonable and rather than refuse to consider the complaint on its merits the Board will follow its normal procedure and consider how this should affect any award of compensation should the complaint succeed.

12. The facts giving rise to this complaint are summarized in this paragraph and

those which follow. The complainant was employed by the company from 1974 to the effective date of his discharge on July 20, 1978. The reason for the discharge is set out in Exhibit #1 as follows:

“The reason for discharge is for violating Rule #8 of the Employee Handbook which states, ‘Refusal or failure to follow the instructions of supervision, or refusal or failure to make a reasonable attempt to perform a job assignment’, and Rule #10 which states, ‘Insubordinate or abusive conduct toward supervision and Security Officers,’ and previous poor record.”

13. On July 20, 1978 the complainant was scheduled to work from 3:30 p.m. to midnight. He reported for work at or before 3:30 p.m. and in the course of his shift participated along with many others in a protest directed against the company on account of what they considered to be the extreme heat in the plant. During the course of this work stoppage the complainant and several others were told to return to work but refused. All participants were told that they could leave but if they did, they would be suspended for the balance of the shift that day.

14. In addition to his admitted participation in the work stoppage, the complainant also admitted to having returned to the plant to pick something up and to having engaged in a fight with another employee who required six or seven stitches as a result of that fight. There is also evidence that the complainant had used what may be characterized as obscene and abusive language to the plant manager and that the complainant had admitted to that at a subsequent grievance meeting.

15. Following the events of July 20th, the company convened a meeting of its representatives, the complainant and his union steward, Mr. Ross. The complainant agreed that at that meeting he and his representative were given an opportunity to state their position. At the conclusion of the meeting, the complainant knew that he was on indefinite suspension pending the company's investigation and decision and he was subsequently advised of his discharge by letter dated July 24th (Exhibit #1).

16. Before proceeding any further, the complainant made much of the fact that he was not responsible for leading or instigating the work stoppage of July 20th. It should be noted that nowhere in the letter of discharge is it alleged that the complainant was responsible for instigating the walkout. The reasons for discharge are set out in the letter and those reasons alone are what the company would have been held to in any proceedings which followed. For the purposes of this hearing and indeed for the purposes of any discussion of the complainant's discharge the question of who led the work stoppage is completely irrelevant. The evidence clearly indicates that this should have been clear to the complainant.

17. Following the meeting with the company officials the complainant testified that he talked with Mr. Ross and asked him to call if there was anything new. The complainant said that he made sure to give Mr. Ross his new telephone number and address, and that Mr. Ross agreed to call him. The complainant then went on to testify that he never received a call or letter from the union about his case, however it would seem that the complainant was calling the union regularly. He asserted that he never received any information from the union about the progress of his case and was given no opportunity to discuss his case with a union representative between July and September.

18. In September the complainant was informed of the terms of a settlement reached in his case the terms of which are reproduced in full below:

“CONDITIONAL REINSTATEMENT OF  
MR. R. HUNTER – MASTER NO. 51175  
SENIORITY DATE 4-10-74

The Company agrees to reinstate the above-named employee without loss of seniority under the following conditions:

1. Any grievance(s) filed regarding the above-named employee is hereby withdrawn.
2. For a period of one year following the date of reinstatement, any violation or infraction of Company rules will result in his discharge without Union representation.
3. No Sickness and Accident Benefits shall be paid to, or on behalf of this employee with respect to any period of disability which commences within one year from the date of reinstatement and which is caused by or the consequence of any mental or nervous disorders.
4. The employee shall not be entitled to claim for any benefits normally associated with his employment within the period extending from the date of his discharge to the date of his return to work.
5. As a further requirement for employment, this employee shall meet the Company medical standards.
6. Return to work shall take place when work opportunity becomes available.
7. The Company shall send out notice to report to the above-named employee at his last address on file with the Company unless advised otherwise by the Union, and failure by the employee to present himself within five days of the date of such notice will result in the cancellation of this conditional reinstatement.”

He said that after this he spoke to Mr. G. Bastien, the second vice-president of local 444, and was told by Mr. Bastien that the union may have been able to get better terms for him if they had talked before the settlement was reached. The complainant said he was also told then and later that the union would not proceed to arbitration because of the merits of the case.

19. The complainant testified that from July to September he continually offered to tell the union the name of the person responsible for instigating the walkout so that the union could investigate his side of the case. He said that at no time did any member of the union ever take him up on his offer or investigate his version of the walkout. The gist of his



complaint against the union appears to be that it failed to investigate his version of the walkout, that it failed to communicate with him throughout, and that the terms of the settlement it negotiated were too unfavourable for him and he was being treated more severely than others who had engaged in the work stoppage.

20. The union's evidence concerning its actions following the complainant's discharge was given by Mr. David Ross, a plant steward, Mr. Ray Lebert, third vice-president local 444, and Mr. James Phillips, grievance co-ordinator of local 444. Their evidence indicates that on the day following the work stoppage they were faced with 51 suspensions and 1 indefinite suspension (the complainant's). On Monday, July 24th a meeting of union officials was convened to discuss the matter. Before the meeting Mr. Ross, who had been at the plant on July 20th, spoke to Mr. Lebert about the events of that day. Mr. Lebert asked Mr. Ross to prepare a "fact sheet" for him of the events of the day and Mr. Ross did this. The "fact sheet" (Exhibit #5) gives a reasonably complete summary of the events which concerned the complainant and the reasons for his indefinite suspension.

12. Shortly after that, Mr. Ross became acting Plant Chairman. It was in this capacity that he prepared and had filed the grievance (Exhibit #6) concerning the complainant's discharge at step 2. Throughout the period while Mr. Ross was acting Plant Chairman he said he approached Mr. Gagnon, who was then in the company's personnel department, daily and asked to have the complainant returned to work because he had three children and a new house. The grievance was rejected and Mr. Ross appealed that and represented the union at the subsequent meeting. He said that he rushed the matter along because he was anxious to try to get the complainant back to work as soon as possible. After the appeal was rejected the matter was turned over to Mr. Bastien who handled all grievances at that level for the local.

22. Mr. Bastien set up a third step meeting with the company for September 8, 1978. Prior to that meeting he had all the documents in the union file and had also had discussions with Mr. Lebert and Mr. Chauvin who were familiar with the situation. At the third step meeting Mr. Lebert was also asked to sit in to make representations about the complainant's case. The union's position at that meeting was that the complainant should be reinstated with full compensation, etc. The company refused. Eventually, the company offered to reinstate the grievor on the conditions set out above in paragraph 18.

23. The union's evidence was that originally the offer was regarded unfavourably as being too harsh. Eventually, Messrs. Bastien, Phillips and Chauvin decided to accept the offer rather than proceed to the next step in the grievance procedure because there were three charges against the grievor all of which likely could be proven, the grievor had taken part in the work stoppage, and the grievor's seniority was relatively short. Mr. Bastien also testified that in the past the union had lost discharge cases at arbitration in which there were fewer and less serious charges against its members, and given the nature of the charges and the real possibility of losing completely at arbitration, the union determined that accepting the offer was the best it could do for the complainant.

24. Mr. Bastien confirmed that he did not speak with or consult the complainant either before the third step meeting or before accepting the company's offer. He testified that because of the volume of cases he must handle it is not possible for him to interview every grievor before the third stage meeting, but that he satisfied himself in this case that he knew



the facts surrounding the imposition of the discipline. He also testified that the union does not normally check with the person concerned before accepting an offer of conditional reinstatement. It would appear that conditional reinstatements of exactly the sort involved in this case are very commonly used by the union and company to settle discharge grievances. Mr. Bastien estimated that every year they may negotiate around 100 of them.

25. Mr. Bastien said that he spoke to the complainant several times within the five day period the complainant was given to consider the matter and advised him to accept the reinstatement. Mr. Bastien was certain that he had discussed the terms of the reinstatement with the complainant and, specifically in relation to the phrase "without union representation", assured the complainant that the union would always be there to represent him, that hundreds of others had survived under those terms, and that he himself had been returned to work under three conditional reinstatements. Mr. Bastien also told the complainant that he would advise against arbitration, but that if he had known of the complainant's attitude beforehand he would have let the complainant go to arbitration and "hang himself."

26. In order to succeed in this matter the complainant must show that the union acted contrary to its duty of fair representation as set out in section 60 of the Act, the terms of which are set out below:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

It has been the consistent jurisprudence of this Board that it will not second guess a union in its handling of a particular matter and that the section does not take away a union's right to determine not to proceed to arbitration in a particular case. The Board will, however, examine the union's handling of a grievance to determine whether the complainant has shown that he has been dealt with arbitrarily, in a discriminatory manner or in bad faith.

27. In this case, the union negotiated a settlement with which the grievor is not pleased. In negotiating this settlement, there is no evidence to show that the union deviated from its usual manner of handling grievances or of accepting terms of a proposed settlement. The terms of the settlement are no more generous nor onerous than those normally accepted by the union.

28. The union did not investigate the complainant's allegations concerning the real instigator of the work stoppage, but, under the circumstances, the Board can think of no reason why it should have done so. The Board has absolutely no doubt that both the company and the union did everything reasonably possible to inform the complainant that he was not being charged with instigating the work stoppage.

29. There is a real dispute about whether the complainant had the terms of his reinstatement explained to him. The complainant's version would have the union casting him adrift with a bad settlement and a refusal to represent him for the next year. Mr Bastien has a great deal of experience in handling grievances and he was definite about the conversa-

tions he had had with the complainant about the settlement. The Board accepts Mr. Bastien's evidence on this point.

30. It would appear that the complainant may have a real difficulty in listening to what people are trying to tell him once he has made up his mind about something. Mr. Bastien appeared to have realized that he may have been having a problem communicating with the complainant, however short of putting his explanation in writing, he appears to have done everything one could reasonably expect of him to make the complainant aware of the meaning of the terms of the settlement.

31. The union did not at any time act in an arbitrary manner. Experienced union personnel made a determination based on their knowledge of the facts and their past experience with similar cases at arbitration. The people who made the decision had acted reasonably in having at their disposal sufficient information to make such a determination. There was nothing capricious, uncaring or reckless in their actions.

32. The union did not at any time act in a discriminatory manner. The usual procedures were followed throughout, and there is no evidence that the complainant was ever being treated any differently than anyone else. The penalty the company imposed against the complainant was more severe than that imposed against anyone else that night because of the additional offences he allegedly committed and there is no obligation on the union under section 60 to ensure that either the other participant in the fight or the real leader of the work stoppage be disciplined.

33. There is no evidence of bad faith on the part of the union. The complainant was being represented throughout in the same way as anyone else and, it would appear, to the best of the union's ability. There is no hint of any personal animosity against the complainant or of anything else which would cause the Board to conclude that the union acted in bad faith.

34. The mere fact that a complainant does not like a settlement is not sufficient to show a breach of section 60 of the Act. The fact that a complainant may not have comprehended the real meaning of the terms of a settlement must be looked at in the context of the union's efforts to represent him and explain the terms to him. At most, in this case there may have been a mistake in judgment on the part of the union in the way it chose to proceed with the case of a single-minded and upset individual.

35. For all of the above reasons, the complaint against the respondents is dismissed in full.

**0267-79-R** Retail Clerks Union, Local 206, chartered by Retail Clerks International Union, A.F.L.-C.I.O.-C.L.C., (Applicant), v. **Dominion Stores Limited**, (Respondent), v. United Steelworkers of America, Locals 14974 and 14045, (Intervener).

**Sale of a Business – Food store closing – leasing nearby premises vacated by competitor – whether sale of business of competitor.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members C. A. Ballentine and W. G. Donnelly.

**APPEARANCES:** *T. Wohl and C. Lanneville for the applicant; C. G. Riggs and W. H. Ashton for the respondent; Brian Shell, Marion Tobin, Ron Varley, Brian McClelland and Joe Ginty for the intervener.*

**DECISION OF THE BOARD;** July 18, 1979

1. This is an application under section 55 of *The Labour Relations Act* in which the applicant trade union seeks a declaration from the Board that it is the bargaining agent for all employees of the respondent at its store location 3220 Dougall Road, Windsor, save and except certain exceptions not here relevant.

2. The facts in this matter may be summarized as follows. Gordon Markets, a Division of Zehrmart, operated a retail food market at 3220 Dougall Road, Windsor, Ontario until November 11, 1978. The Board in a decision dated July 10, 1978 found, under section 55 of the Act, that Gordons was the successor employer to Loblaw's at the above noted location and was bound by the terms of the collective agreement between Loblaw's and the applicant Union. Dominion Stores Limited was approached by Burnac Leaseholds in late September and asked if it would be interested in the premises at 3220 Dougall Road. Dominion Stores reached an agreement with Burnac in respect of these premises and occupied the premises on February 26, 1979. Dominion Stores had operated a retail food market in the immediate vicinity at 3950 Dougall Road, Windsor which it closed on Saturday April 7, 1979. Dominion opened for business at the 3220 Dougall Road location (the location vacated by Gordons Markets on November 9, 1978) on Monday, April 9, 1979. The employees of Dominion who had worked at the 3820 Dougall Road location were transferred to the new location. They had been represented by the United Steelworkers at the new location as if covered by the terms of the agreement between the Steelworkers and Dominion Stores covering the company's employees in Windsor.

3. The lease entered into between Burnac Leaseholds and Dominion Stores Limited extends for the same term as the previous lease on the premises held by Gordon Markets. In addition Burnac assigned to Dominion, as a term of the lease, all rights and interests in an agreement between Zehrmart (Gordons) and itself by which Zehrmart covenants with Burnac that for the period ending January 31, 1984 it shall not carry on a competing grocery or food retailing business within a distance of 1½ miles from the site of the 3220 Dougall Road location. Dominion Stores Limited entered into negotiations with Bultec Limited for the fixtures which had been owned by Gordons in November, 1978. An agreement was reached whereby Dominion Stores Limited purchased the fixtures which had been used by Gordons



at 3220 Dougall Road for \$½ million. Dominion Stores also provided approximately \$½ million of fixtures to be used at the 3220 Dougall Road location. Dominion stocked the 3220 Dougall Road Store with product from its own suppliers. There was no direct negotiation or exchange between Gordons and Dominion Stores in respect of the business formerly carried on by Gordons at 3220 Dougall Road or any component of it except for a letter from Zehrmart to Dominion identifying certain fixtures listed on the inventory sheet supplied to Dominion by Builtec. There is no corporate relationship of any kind between Dominion Stores Limited and Gordon Markets.

4. Section 55 of the Act provides that where a business or part of a business is sold, leased, transferred or otherwise disposed of, the successor employer is bound by the collective bargaining obligations of its predecessor. Section 55(2), which is relevant to this case, states:

“Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

5. The applicant argues, having regard to the jurisprudence of the Board, that it should find that a sale of a business within the meaning of section 55 has occurred. The applicant relies on the arrangement made by Dominion Stores to lease the same premises as those occupied by Gordons and the purchase of the fixtures used by Gordons at this location. The applicant argues that the restrictive covenant between Burnac and Gordons in respect of limiting competition in the immediate area assigned to Dominion Stores, underscores the function played by Burnac as an intermediary between Gordons and Dominion and supports the conclusion that the sale of a business occurred between Gordons and Dominion. The respondent, on the other hand, argues that Dominion Stores has simply transferred its business from 3820 Dougall Road to 3220 Dougall Road and has not bought the business of the predecessor. The applicant relies on the lack of direct contact between Dominion Stores and Gordons and argues that the lease arrangements and the purchase of fixtures from Builtec were made in connection with the transfer of Dominion's business and should not be considered as evidence of a sale of the predecessor's business. Counsel for the respondent referred to the restrictive covenant limiting Gordon's competition in the immediate area, as a prudent business precaution taken by Dominion Stores in the face of its decision to transfer its business to 3220 Dougall Road. The intervener union supports the position taken by the company and asks the Board to find on the evidence that Dominion Stores transferred its business from 3820 Dougall Road to 3220 Dougall Road and that accordingly, it holds the bargaining right in respect of the company's employees at 3220 Dougall Road.

6. Section 55 of the Act is designed to preserve bargaining rights where a business is sold. When the business of the predecessor continues as the business of the successor what-



ever bargaining rights attach to the predecessor's business continue regardless of the form of the transaction. The Board was careful to point out in both the *Gordons Markets* case [1978] OLRB Rep. July 630 and the *Thunder Bay Ambulance Service* case [1978] OLRB Rep. May 467 that the Board must be careful to distinguish between the predecessor's business and a similar or parallel business which performs work of a similar nature. The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a continuation of that business.

7. The Board has made certain observations about the nature of the retail food industry in its section 55 jurisprudence. The Board has noted that goodwill may consist in large measure "in the habit of customers of the vendor continuing to patronize the food market located on the same premises" and therefore exemption of goodwill from the purchase price where the successor occupies the same premises has no real meaning. Similarly, the Board has commented that "it is to be expected that one chain food store would not be interested in acquiring the food stuffs and inventory of another chain food store" and accordingly, the failure to purchase foodstuffs and inventory is of no real significance when such a transaction occurs. Finally, the Board commented that "it is generally necessary to shut down operations at the time of a sale in order to give the new owner an opportunity to make renovations which are in accord with its particular method of merchandising" and to stock the premises and accordingly, the Board should not give undue weight to an hiatus of operation at the time of the alleged sale. (See re *Dutch Boy Food Markets* case 65 CLLC ¶16,051 and *Gordons Markets* case *supra* and the cases referred to therein).

8. While the jurisprudence referred to above is helpful in a general sense, each case must turn on its own facts. In this case certain of the facts, when considered in the context of the retail food industry, point to the sale of a business. The alleged successor now occupies and carries on a food retailing business from the same premises as those formerly occupied by the predecessor food market. The alleged successor purchased, albeit through an intermediary, one half million dollars worth of fixtures which had been used in the predecessor's business. While the alleged successor dealt with Burnac in respect of the lease, the Board is satisfied, having regard to the request by Dominion that Gordons not compete in the immediate area for a fixed period of time and the reference in Dominion's lease to the restrictive covenant between Gordons and Burnac, that Burnac also served as an intermediary between Gordons and Dominion. These facts standing by themselves might well cause the Board to conclude that a sale of a business within the meaning of the Act has occurred. In this case, however, these facts must be viewed in light of the additional fact that Dominion Stores Limited, a company with no corporate connections of any kind to Gordons, carried on a competing food retailing business of its own within the same area as prior to the transaction which is the subject matter of this complaint. The pre-existence of a Dominion Store in the immediate area is important for two reasons. Firstly, because Dominion Stores operated in the immediate vicinity its decision to occupy the same premises as Gordons is less significant than it otherwise might be. Secondly, the existence of a Dominion Store in the immediate area causes the Board to give the greater weight to the 5 month hiatus that it otherwise might. The Dominion Store at 3830 Dougall Road continued to operate during the hiatus thereby causing the Board to conclude that shoppers frequenting the immediate area prior to the re-opening of the 3220 Dougall Road location would have a loyalty to Dominion Stores and not Gordons or the premises previously occupied by Gordons.

9. Dominion Stores, a retail food chain with no corporate connections to Gordons,

closed a Dominion Store outlet at 3830 Dougall Road on a Saturday and opened a Dominion Store outlet at 3220 Dougall Road the following Monday. The employees from 3830 Dougall were transferred to 3220 Dougall Road. In the circumstances of this case the Board views the move by Dominion Stores to premises previously occupied by Gordons, including the so-called restrictive covenant, and the purchase of certain of the fixtures used by Gordons as undertakings in conjunction with the transfer of an existing business and not undertakings in conjunction with the purchase of the predecessor's business. The business which presently exists at 3220 Dougall Road is not the "continuum" of the predecessor's and accordingly, the Board hereby declares that there has not been a sale of a business within the meaning of the Act.

10. The United Steelworkers of America Locals 14974 and 14045 as bargaining agent for all of the employees of Dominion Stores in the Municipality of Windsor hold the bargaining rights in respect of the respondent's retail outlet at 3220 Dougall Road, Windsor.

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**0269-79-U; 0270-79-U Ecodyne Limited, (Applicant), v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 628, R. Brooks, G. Caruso, Paul A. Chicorli, D. Dedura, Yvan Dufort, T. Lacey, Henry Mandziuk, W. J. Marsh, J. Rybak, and D. Wyrozub, (Repondents), v. Ontario Hydro, (Intervener # 1), v. The Electrical Power Systems Construction Association, (Intervener # 2), v. Mechanical Contractors Association of Ontario, (Intervener # 3).**

**Bargaining Rights – Collective Agreement – Construction Industry – Section 123 – Strike – Union instructing employees to quit – whether mass quit constituting strike – agreement covering ICI sector – not applicable to Hydro project – employer abiding by ICI agreement on Hydro project – not conferring bargaining rights on union – individual repondents not employees as of hearing date – no direction issuing**

**BEFORE:** Ian C. A. Springate, Vice-Chairman.

**APPEARANCES:** *C. E. Humphrey and D. Hickling for the applicant; S. B. D. Wahl and G. Meservier for the repondents; H. A. Beresford and W. S. O'Neill for interveners #1 and #2; G. Grossman for intervener #3.*

**DECISION OF THE BOARD;** July 10, 1979

1. The proceedings in files 0269-79-U and 0270-79-U are hereby consolidated.
2. This is an application for relief under section 123 of *The Labour Relations Act*. Section 123, which applies only to the construction industry, states as follows:

“Where on the complaint of an interested person, trade union, council

of trade unions or employers' organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike."

3. The job site affected by this application is a generating station owned by Ontario Hydro ("Hydro") at Mission Island near Thunder Bay. In March of 1977, Hydro let a contract to Ecodyne Limited ("Ecodyne") for the design, manufacture and installation of certain water treatment equipment at the Mission Island generating station. According to Mr. A. Lindstol, Ecodyne's chief engineer, Hydro requested that the equipment be constructed as a number of skid-mounted units which could be shipped to the Mission Island site for installation.

4. In April of 1977, Ecodyne entered into a contract with a company identified in these proceedings only as "Procor" for the manufacture of ten skid-mounted units. It is common ground that Procor's employees are represented by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

5. In August or September of 1978, Ecodyne let a contract for the installation of the skid-mounted units to Adam Clark Company Ltd. ("Adam Clark"), a construction company with headquarters in Hamilton. Much of the work apparently involved the installation of piping both to link the various units and also to connect them to other parts of the project. Adam Clark proposed to utilize the services of a number of pipefitters in its employ for this purpose. These pipefitters are the individual respondents in these proceedings. They are all members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the "U.A."), Local Union 628 ("Local 628").

6. Employees of Adam Clark first arrived on the job site in November 1978. The skid-mounted units started arriving on the site on or about December 19, 1978, with the last one arriving approximately March 7, 1979. When the skid-mounted units began to arrive Mr. G. Meservier, the business manager for Local 628, raised a concern about the fact that certain piping on the units did not bear the U.A. labels, and thus presumably had not been worked on by U.A. members. Notwithstanding this concern, members of Local 628 off-loaded and set up the equipment. Mr. Meservier candidly admitted that he was concerned that if Local 628 members did not perform the off-loading and setting up, the work involved would likely have been assigned to members of the International Association of Bridge, Structural and Ornamental Iron Workers.

7. Because of continuing complaints by Mr. Meservier concerning the lack of U.A. labels on the units, a meeting was held in Thunder Bay on or about March 7, 1979. Mr. Meservier attended the meeting as did representatives of both Ecodyne and Adam Clark.



At the meeting Mr. Meservier made it clear that in his view the skid-mounted units were unacceptable to his union since they lacked U.A. labels. Mr. Meservier further indicated that as far as he was concerned only three options were open to the two companies, namely:

- (1) remove the skid-mounted units and replace them with units bearing the U.A. labels;
- (2) have members of Local 628 rework the units (the cost of which was estimated as being between \$100,000 and \$200,000); or
- (3) not have the units reworked, but pay to Local 628 the amount it would have cost to have them reworked.

8. The two companies declined to accept any of Mr. Meservier's three alternatives. On March 9, 1979, Mr. Meservier came onto the job site and in the presence of Mr. J. Richmond, Adam Clark's job superintendent, addressed the pipefitters. According to Mr. Richmond, Mr. Meservier told the men that nothing had been resolved concerning the skid-mounted units, and that unless they heard otherwise they were to quit their employ with Adam Clark at 10 o'clock on March 14th and report to the union hall. Mr. Meservier, when giving his evidence, denied that he said anything about men quitting at 10 o'clock on March 14th. According to Mr. Meservier, he merely stated that should the men quit, there would be jobs available for them. Having regard to the manner in which both men gave their evidence, and to the undisputed evidence concerning the subsequent acts of the employees, the Board has no hesitation in accepting Mr. Richmond's evidence over that of Mr. Meservier concerning what he told the employees on March 9th.

9. On March 14, 1979, at about 9:45 a.m., the individual respondents stopped work and began to report one by one to Mr. Richmond to indicate that they were quitting. By shortly after 10 o'clock the only people in Adam Clark's employ left on the job site were Mr. Richmond, the crew foreman, who was a member of Local 628, a labourer whose job it was to clean up after the pipefitters, and the union steward on the job. The steward stayed to help secure the job site but then left about noon of the same day.

10. On March 14, 1979 Mr. Richmond telephoned Adam Clark's offices to inform them of the actions of the men. On March 15th, the company's payroll department in Hamilton issued each of the men a separation certificate in the form prescribed by Employment and Immigration Canada. Adam Clark also forwarded to the men any vacation and holiday pay that was owing to them.

11. Mr. Richmond, the foreman and the labourer stayed on the job site for another few days. The foreman was laid off on March 20th and the labourer on March 21st. Mr. Richmond himself was instructed to leave the job site on March 21st.

12. The members of Local 628 who left the job site on March 14th all reported to the union hall and were referred to other jobs. Two of them were later referred to yet other jobs when the ones they were initially referred to came to an end. At the time of the hearing all of the men were employed by contractors in the Thunder Bay area.

13. The job site was essentially shut down from March 21 to May 7, 1979. However, on May 4, 1979 Ecodyne sent Adam Clark the following letter:

“Re: Ontario Hydro – Thunder Bay Erection of Water Treating Equipment  
Our Order CAN77-30258  
Your Contract 202122

Under the above contract, Adam Clark are to receive and erect equipment at Thunder Bay for Ecodyne Limited.

We understand that there was a work stoppage on or about March 14th, 1979, and there has been no real progress since then. As you know our contract with Ontario Hydro calls for erection to be completed by the end of April and this is past already.

Would you please advise us, by return if possible, what action you propose to take to rectify the present situation and complete your contract. We hope you can get back to us by Monday, May 7th. In the meantime, we are holding all further payment on this contract.”

14. On May 7, 1979 Adam Clark sent the following telegram to Local 628, to the attention of Mr. Meservier:

“As you are aware, 10 of your members terminated their employment at our Ontario Hydro Project on Mission Island, Thunder Bay, Ontario, on March 14, 1979 resulting in our ceasing work at the site.

We have been directed by our client to resume work on the project immediately, therefore, request you to supply the following tradesmen to report to the site at 8:00 am on May 8, 1979.

Mr. D Jackson as foreman, J Rybak, W Marsh, H Manuziuk, P Chicorli, Y Dufort, G Caruso, B Brooks, T Lacey, D Wyrozub, and D Dedura [sic].

Please acknowledge if request can be fulfilled by Tuesday, May 8, 1979 [sic].”

15. No response was received to this telegram. Nevertheless, on May 7th, Mr. Richmond, Adam Clark’s job superintendant, returned to the site and has since that time continued to report to the site. However, neither the individuals referred to in the telegram nor any other members of Local 628 reported to the site. It would appear that Adam Clark has not attempted to obtain employees other than through the union.

16. Ecodyne filed the applications for relief under section 123 on May 9, 1979 alleging that a strike had occurred against Adam Clark. Although served with notice of the applications, Adam Clark was notably absent from the hearings. When the hearings commenced, the status of Ecodyne to bring the applications was challenged by Local 628 on the grounds that Ecodyne neither employed the tradesmen who were alleged to have gone on strike nor any other employees on the site who might be affected by such a strike. The Board, however, ruled that since Ecodyne was the prime contractor for the work involved it

was “an interested person” within the meaning of section 123(1) of the Act and hence did have status to bring the application.

17 The factual events referred to above were dealt with at a hearing held on May 29, 1979 at which only Ecodyne, Local 628 and the individual respondents were represented. On agreement of counsel, a second date was set aside for the purpose of dealing with the rather complex questions of what bargaining rights, if any, covered pipefitters working for Adam Clark on the Mission Island site, and also whether these employees were in a legal position to strike.

18. On the second day of hearing, counsel attended for the first time on behalf of the three interveners. No one challenged the right of the Mechanical Contractors Association of Ontario to intervene, but counsel for Local 628 did challenge the status of both Hydro and The Electrical Power Systems Construction Association (“EPSCA”). The Board reasoned at the time that as the owner-client of the project, Hydro had a sufficient interest in the matter to be an “interested person” within the meaning of section 123 and that therefore Hydro could have itself brought the application. This being the case, the Board ruled that Hydro did have a sufficient interest to intervene in the proceedings. Since Hydro and EPSCA were represented at the hearing by the same counsel, who indicated he was not planning to make any submission on behalf of EPSCA that he would not also be making on behalf of Hydro, the Board indicated that there would be no need in these proceedings to rule on the status of EPSCA to intervene.

19 Also on the second day of hearing, counsel for the Mechanical Contractors Association of Ontario requested an adjournment so as to allow the Association time to gather together evidence of past practice under certain predecessor local agreements to a current province-wide agreement between the Association and the Ontario Pipe Trades Council. It was his contention that this evidence would demonstrate that the current agreement covers construction work on Hydro generating stations, including the Mission Island site.

20. The Board refused to grant the requested adjournment, a refusal which prompted counsel for the Mechanical Contractors Association of Ontario to ask that reasons for the ruling be given in writing. One reason was that in the Board’s opinion applications for relief arising out of alleged unlawful strikes and lockouts should be dealt with as expeditiously as possible. In addition, the point that counsel for the Association indicated he would be seeking to establish through the evidence of past practice, namely that the predecessors to the province-wide agreement were applied to Hydro sites, was apparently not being challenged by the other parties. As it turned out, the evidence led before the Board established not only that the terms of at least some of the predecessor local agreements, including the one applicable to the Thunder Bay area, were applied to Hydro construction sites, but also that the terms of the current province-wide agreement have also been applied to Hydro sites.

21. Central to understanding the issue of bargaining rights on Hydro construction sites is the concept of sectors in the construction sector. Section 106(e) of the Act defines “sector” in the following terms:

“In this section and in sections 107 to 124,

• • •



- (e) "sector" means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector;"

• • •

It is to be noted that the Act specifically provides that the industrial, commercial and institutional sector ("ICI sector") and the electrical power systems sector are separate and distinct sectors.

22. Although section 106(e) indicates that sectors are divisions of the construction industry determined by work characteristics all of the names given to the sectors (with the exception of the heavy engineering sector) appear to relate to the use which is ultimately made of the construction. As the board noted in *The Heavy Construction Association of Toronto* case [1973] OLRB Rep. May 245, this may at first appear to be somewhat of a puzzle in that the connection between the use made of construction and work characteristics may not be all that clear. However, as the Board noted in that case at page 249:

"... Upon examination, however, it becomes clear that the use that is ultimately made of the construction will to a large extent determine the task or the work to be performed at the construction site. The task in turn will have certain characteristics which make that project distinguishable from other types of construction. Thus, each of the sectors enumerated, by focusing on the different end uses of the construction, distinguishes one type of construction from other types of construction on the basis of peculiar tasks which are common to that type of project. The work characteristics which distinguish one sector from the other sectors of the construction industry may be shown in terms of the type of problems to be dealt with at the job site, the types of solutions resorted to at certain job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as examples of particular characteristics which differ between the various sectors enumerated in the Act."

23. At the hearing counsel for the Mechanical Contractors Association of Ontario contended that the work performed by mechanical contractors on Hydro generating sites was essentially the same as that which they perform on ICI projects, that they often employ the same employees to do the work and that accordingly the Board should regard Hydro generating sites as coming within the ICI sector. The Board accepts as correct the contention that much of the work on Hydro generating stations is basically similar to work done on ICI projects, and that contractors who primarily operate in the ICI sector do work on Hydro stations utilizing the same trades as they do for ICI work. However, notwithstanding these facts, it must be kept in mind that the Legislature in drafting section 106(e) has determined that there does exist a separate division of the construction industry called the electrical power systems sector. Further, keeping in mind the reasoning of the Board in *The*

*Heavy Construction Association of Toronto* case set out above, the Board is satisfied that Hydro generating projects logically fit within this sector, and indeed that a finding to the contrary would in all the circumstances be an unreasonable conclusion. It is perhaps worth noting in this regard that the Report of the Industrial Inquiry Commission set up to inquire into, report upon and make recommendations concerning the possible extension of province-wide bargaining to the electrical power systems sector (“the Ellis Report”) described the sector as including the construction of Hydro’s major power generation projects, long distance, high voltage, transmission lines and transformer stations. At page C. 1-3 of the report is to be found the following comment concerning how the electrical power systems sector is generally viewed.

“The construction industry, or at least those construction industry participants who are the most concerned about the issues of interest to the Inquiry, in fact understands the Electrical Power Systems Sector to be primarily a euphemism for Ontario Hydro’s capital construction program – both the construction of long distance high voltage transmission lines and transformation stations, and the construction of major power generation projects such as the Pickering Nuclear Power Generating Project and the Bruce Nuclear Power Development Project.”

24. Having regard to the above, the Board is satisfied that construction work on Hydro generating projects, including the one at Mission Island, is work within the electrical power system sector of the construction industry, and accordingly, is not work within the ICI sector.

25. The fact the work on the Mission Island site does not come within the ICI sector, means that it is not directly affected by those provisions of the Act which provide for province-wide single trade, multi-employer bargaining in the ICI sector of the construction industry. (See sections 125-136 of the Act, which were enacted by *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31.)

26. Prior to the advent of province-wide bargaining in the ICI sector, Local 628 was party to at least two successive collective agreements with the Mechanical Contractors Association of Thunder Bay. At the hearing, counsel for Ecodyne and Local 628 agreed that these collective agreements had been binding on Adam Clark. The first such collective agreement ran from July 1975 to April 1977. The second collective agreement was a one page document which picked up by reference the language of the previous agreement with certain changes not here relevant. This second agreement expired on April 30, 1978. These two collective agreements stated as follows:

#### “ARTICLE 2 – RECOGNITION

The Union agrees to recognize the Association as the sole collective representative bargaining agent for all Employers as defined in this Agreement. The Union agrees to supply members of the Mechanical Contractors’ Association of Thunder Bay with Employees who are members of the Union ...

The employer recognizes only the Union as the sole collective bargaining agent for all employees of the Contractor.

## ARTICLE 22 – GEOGRAPHIC SCOPE

22.01 This Agreement shall be applicable to and effective within the geographic jurisdictional area and scope as defined in the accreditation certificate, File No. 2764-72-R, issued by the Ontario Labour Relations Board, which reads as follows: –

“in the Districts of Thunder Bay, Rainy River, Kenora, the Patricia Portion and that part of the Districts of Algoma, Sudbury and Cochrane lying north of the 48th parallel of latitude and west of the 82nd degree west meridian of longitude in the industrial, commercial and institutional sector and the residential sector in the construction industry.”

27. When reading these two sections together, the Board is satisfied that the collective agreement covered all employees of the affected contractors (including Adam Clark) who were employed in the stated geographical area in only the ICI and the residential sectors.

28. The evidence establishes that when contractors bound by the local Thunder Bay area collective agreements worked on Hydro projects, they applied the terms of the agreements to their employees notwithstanding the fact that these employees were not included within the scope clause of the agreements. The mere fact that the terms of a collective agreement are applied to a certain work and to certain employees does not, however, mean that the union party to the collective agreement has actual bargaining rights for the employees involved. See: *Bechtel Canada Limited*, Board File No. 0745-75-R, an unreported decision dated September 3, 1975. In this regard it might be noted that it is not at all uncommon in the construction industry for employers not formally bound to a collective agreement to nevertheless employ union members under the same terms and conditions as set forth in a collective agreement without any intention of thereby conferring bargaining rights on the union. Similarly, trade unions in such circumstances sometimes refrain from applying to the Board to be certified as the legal bargaining agent of the employees involved notwithstanding the fact that the employees are union members.

29. Having regard to the above, the Board is satisfied that on April 30, 1979, at the time of the expiry of the last local collective agreement between Local 628 and the Mechanical Contractors Association of Thunder Bay, Local 628 held bargaining rights for employees of Adam Clark working in the Thunder Bay area only when working within the ICI and residential sectors.

30. With the advent of province-wide bargaining in the ICI sector, the bargaining relationship between Local 628 and the Mechanical Contractors Association of Thunder Bay, insofar as the ICI sector was concerned, was bargained for as part of the negotiations between the Ontario Pipe Trades Council of the U.A. and the Mechanical Contractors Association of Ontario. On April 11, 1978, after a meeting between the Association and the Pipe Trades Council, the Council applied for the appointment of a conciliation officer. In the request a reference was made to the amendment of the Act instituting province-wide bargaining. The request also stated that the work being done by employees affected by the request was the “fabrication and installation of Industrial, Commercial and Institutional piping systems”.



31. Following the unsuccessful conclusion of conciliation, the Minister of Labour on May 30, 1978 issued a "No-Board" report. The report indicated that it was referable to a bargaining dispute between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council, but contained no reference to any particular sector or sectors.

32. At the hearing counsel for Local 628 contended that the "No Board" report was broad enough to cover employees working within the electrical power systems sector. With this contention the Board is unable to agree. A reading of those sections of the Act dealing with the conciliation process, and indeed a reading of the Act as a whole, indicates quite clearly that conciliation officers and conciliation boards are appointed with reference to bargaining disputes concerning the terms and conditions of employment of employees for whom the union has bargaining rights. It follows that the decision of the Minister not to appoint a conciliation board must likewise be viewed as being applicable only with respect to those employees for whom the union has bargaining rights. In these circumstances, the Board is of the view that since Local 628 did not have bargaining rights for employees in the electrical power sector, the "No Board" report of May 30, 1978 did not relate to Adam Clark's employees in the Thunder Bay area who were working in the electrical power systems sector.

33. The negotiations between the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council finally did result in a collective agreement which states that it became effective on June 15, 1978. Article 3.1 of the agreement provides as follows:

"This is a Provincial Agreement within the meaning of The Labour Relations Act of Ontario and as such applies to the Industrial, Commercial and Institutional Sector of the Construction Industry."

34. This collective agreement was originally put forth by Ecodyne as covering the employees of Adam Clark working on the Mission Island site. However, in light of the above conclusion that the Mission Island site comes within the electrical power systems sector, as well as the fact that the collective agreement indicates on its face that it is limited to the ICI sector, the Board is unable to accept this contention. Further, for the reasons stated earlier, the fact that the terms of the collective agreement are apparently applied to employees working on the Mission Island site did not by itself have the effect of expanding the scope of the collective agreement. (It perhaps should be noted that the evidence establishes that both the Mechanical Contractors Association of Ontario and the Ontario Pipe Trades Council of the U.A. were well aware of the fact that this collective agreement did not cover Hydro generating sites. Indeed, on at least two occasions these two bodies considered the possibility of entering into a separate collective agreement which would cover Hydro sites.) In these circumstances and in light of all the evidence before it, the Board can only conclude that pipefitters in the employ of Adam Clark on the Mission Island site were not covered by a collective agreement and that Local 628 did not hold formal bargaining rights with respect to the employees.

35. Having regard to this conclusion, any strike of pipefitters in Adam Clark's employ could neither have been preceded by the appointment of a conciliation officer under the Act nor the release of an applicable "No Board" report. Accordingly, such a strike would not have met the requirements for a timely legal strike set out in section 63 of the Act. Therefore, if the pipefitters in Adam Clark's employ who tendered their resignations on March 14, 1979 did engage in a strike, the strike would have been unlawful.

36. Section 1(1)(m) of the Act defines a “strike” in the following terms:

“1(1) In this Act,

• • •

(m) “strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of the employees designed to restrict or limit output;”

• • •

37. At the same time that the employees ceased to work and indicated that they were quitting there was a cessation of work or a refusal to work by the employees. Further, since their actions were carried out in response to Mr. Meservier’s directions, the Board has no hesitation in concluding that their conduct was carried out in combination or in concert or in accordance with a common understanding. In light of these conclusions, the Board is satisfied that the conduct of the individual respondents in stopping work at the Mission Island site amounted to a strike within the meaning of the Act. Further, having regard to the reasoning set out above concerning the legality of such a strike, the Board finds that the ten individual respondents did engage in an unlawful strike against Adam Clark.

38. The strike occurred as a result of Mr. Meservier’s instructions on March 9, 1979 to the employees of Adam Clark as to the course of action they should take on March 14th. The Board is satisfied that his conduct in this regard amounted to counselling, procuring, supporting or encouraging an unlawful strike. The Board is further satisfied that when giving directions to the employees, all of whom were members of Local 628, Mr. Meservier was acting within the scope of his authority as business manager of Local 628, and accordingly, pursuant to section 88(2) of the Act, his conduct is deemed to have been the conduct of Local 628. In these circumstances the Board is satisfied that Local 628 called or authorized an unlawful strike of employees of Adam Clark.

39. Counsel for Local 628 contended that even if a strike did occur at the time the employees resigned from Adam Clark, nevertheless, when they obtained employment elsewhere they ceased to be employees of Adam Clark and accordingly it could not be said that the strike was still continuing.

40. Adam Clark’s employees stopped working and submitted their resignations on March 14, 1979. All of them obtained other employment, and all were working at the time of the hearing. Adam Clark’s response to the resignations was to issue separation certificates and vacation pay to the men and to close down the job site. The site remained closed for some seven weeks without Adam Clark taking any steps to re-open it. The Board is satisfied that the tradesmen, by their conduct, did in fact sever their employment relationship with Adam Clark, and that Adam Clark accepted their conduct as having this result. All of the men are now employed elsewhere. In these circumstances, and lacking any applicable collective agreement which might create some special employment status apart from that rec-

ognized in the common law, it cannot be reasonably said that these men are still employees of Adam Clark. Further, having regard to the use of the term “employees” in the definition of “strike” in section 1(1)(m) of the Act, the Board is of the view that since these individuals are not still employees of Adam Clark, they cannot still be on strike against that company. (See: *Joyce and Smith Plating Company* (1956) 56 CLLC ¶18, 048)

41. At the hearing counsel for Ecodyne did not contend that the Board should order Adam Clark’s former employees to return to the job site. Instead, he asked that the Board direct Local 628 to refer tradesmen to Adam Clark on the same basis as it would to any other employer. If there were a collective agreement in force which required Local 628 to refer men to Adam Clark on the Mission Island site, then on the basis of the reasoning in *Local 273 International Longshoremen’s Association v. Maritime Employers Association*, [1979] 1 S.C.R. 120; 89 D.L.R. (3d) 289 it might well be that any refusal on the part of the Local to refer tradesmen would amount to an unlawful strike. If such were the case, then the order requested might well be appropriate. However, here there is no applicable collective agreement and hence no obligation on the union to refer tradesmen to the site, nor, for that matter, any obligation on the part of Adam Clark to use only members of Local 628 to do their work. In these circumstances the Board sees no basis for directing Local 628 to refer tradesmen to Adam Clark to work on the Mission Island site.

42. The Board is, however, of the view that it should make a formal declaration concerning the role of Mr. Meservier and Local 628 in bringing about the unlawful strike.

43. Accordingly, the Board declares:

that United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628, did call or authorize an unlawful strike of employees of Adam Clark, and that Mr. George Meservier, an officer, official or agent of the said union did counsel, procure, support and encourage the said unlawful strike.

44. It should be noted that it may be open to Ecodyne and Adam Clark to seek relief either at common law or under *The Labour Relations Act* for any financial losses suffered as a result of the events set out above. That, however, is a matter beyond the scope of these proceedings.

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**0577-79-R** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Erie & Huron Beverages Limited**, Respondent.

**Certification – Practice and Procedure – Second certification application dismissed within one month of dismissal of first application – whether bar or conditions imposed on subsequent applications**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members C. G. Bourne and W. F. Rutherford.

**APPEARANCES:** *Ken Petryshen, Al Lefort and Ray Bartolotti for the applicant; Michael Gordon and David Dick for the respondent.*

**DECISION OF THE BOARD;** July 27, 1979

1. This is an application for certification.
2. The applicant asked leave to withdraw its application. Having regard to the stage of the proceedings at which the request was made the Board, following its usual practice, dismisses the application.
3. In view of the circumstances of this case coupled with the fact that approximately one month prior to this application the union withdrew another application for certification after the Board had ordered that a representation vote be taken, the respondent asked the Board either to impose a six-month bar to another application for certification or to issue a caution to the union that if it applies again within six months it must show cause why the new application should be heard.
4. The Board's general practice is to impose an automatic six-month bar to a subsequent application for certification if a representation vote has been taken and lost by the union. As well, the Board has consistently taken the position that a union should not be allowed to anticipate defeat in a representation vote and escape a bar by withdrawing its application after a vote has been directed but before it has actually been taken. The Board recognizes, however, that there may be circumstances other than an anticipation of defeat and desire to avoid a bar motivating a union to withdraw its application between the direction and taking of a vote. Instead of evaluating the circumstances surrounding the withdrawal at the time of the request for withdrawal, the Board in these circumstances normally issues a caution to the applicant that in the event it brings a new application within six months it will bear the onus of establishing that special circumstances existed to warrant the new application being heard. (See *Mathias Ouellette* 56 CLLC ¶18,026)
5. In this case the applicant's request for withdrawal was made after the Board refused to amend the bargaining unit previously agreed to by both parties but prior to a direction that a representation vote be taken. Accordingly, this is not the type of situation outlined in *Mathias Ouellette* where the Board issues a caution. Furthermore, the Board is fully satisfied that the motivation for the withdrawal was that the union had made a mistake

in the description of the bargaining unit applied for and not an anticipation of defeat in the event of a vote.

6. Regarding the situation surrounding the previous withdrawal, we note that the Board did not in the circumstances of that case issue a caution to the applicant. The union's explanation for the withdrawal of its first application was that for months after the vote was ordered on December 8, 1978 there was only one employee in the bargaining unit during which time the vote was delayed in an effort to avoid a vote of only one person. This situation was followed by the influx of new employees. In those circumstances the union stated that it thought that a new application with fresh membership evidence was the most appropriate course and consequently withdrew its pending application.

7. Having regard to the union's representations concerning its request to withdraw its previous application for certification coupled with the facts of this case as outlined above, the Board is satisfied that the situation does not warrant the Board issuing either a bar or a caution.

8. Accordingly, the application is dismissed without the imposition of conditions.

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**0465-79-U Ontario Nurses' Association, (Complainant), v. Extendicare Ltd., North York, (Respondent).**

**Evidence – Practice and Procedure – Privilege – Witnesses – Witness refusing to answer questions revealing confidential information obtained during College of Nurses investigation – Information not privileged – Board finding witness committing contempt in its face – stated case referred to Divisional Court for punishment.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and C. A. Ballentine.

**APPEARANCES:** *Donald F. Hersey and Ms. Beth Symes for the complainant; C. F. Murray and Gordon Spear for the respondent; M. M. Koenigsberg for the College of Nurses of Ontario.*

**DECISION OF THE BOARD;** July 12, 1979

1. The name "Betty K. Luxton and Extendicare Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read: "Extendicare Ltd., North York".

2. This is a complaint under section 79 of *The Labour Relations Act* alleging that the grievor, Mrs. Ruby L. Reynolds, has been dealt with by the respondent contrary to the provisions of sections 58 and 61 of *The Labour Relations Act*. During the course of the Board's hearing on July 5, 1979 a witness who was testifying under subpoena refused to answer certain questions put to her by counsel for the respondent and refused to produce certain documents which, by the terms of the summons, she was required to bring with her. This is an in-

terim decision dealing solely with the relevance of the questions asked, the admissibility of the answers and documents and the compellability of the witness to answer the questions which were put to her and to produce the documents which were subpoenaed.

3. The grievor is a Registered Nurse who was employed in a nursing home operated by the respondent in the city of North York. Her employment relationship of some 18 months with the respondent came to an end on or about August 28, 1978. Within three weeks of the termination of her employment she was given notice by the Investigations Officer of the College of Nurses of Ontario that some 33 separate allegations of professional misconduct or incompetence had been filed with the College against her. In early November of 1978 Mrs. Reynolds was advised that the Complaints Committee of the College had referred the matter to a hearing of the Discipline Committee in accordance with section 84(1) of *The Health Disciplines Act, 1974*, S.O. 1974, c. 47. The hearing of the Discipline Committee was held January 24 and 25, 1979. In a written decision, dated March 7, 1979, the Discipline Committee of the College dismissed all of the complaints against Mrs. Reynolds.

4. The complaint states that notwithstanding the dismissal of the complaints of professional misconduct against her the grievor has been rendered incapable of securing full-time employment as a Registered Nurse and has been able to find work only as a casual part-time nurse. The complaint alleges that the respondent deliberately fabricated the complaints against Mrs. Reynolds in order to discredit her in her profession as a reprisal for her participation in the organizing of a trade union among the employees of the respondent at her nursing home. The complainant seeks extensive relief, including the reinstatement of the grievor to full-time employment with the respondent with compensation for all the monies and benefits lost as a result of the proceedings brought against her within the College of Nurses.

5. The allegations against the respondent are serious. In effect they charge extendicare with having deliberately pursued a form of malicious prosecution to punish an employee for her union activity. At the hearing, by a majority ruling, the Board determined that because the complaint alleges that the grievor was dealt with contrary to the provisions of the Act in such a way as to affect her opportunity for employment, pursuant to the provisions of section 79(4a) of the Act, the burden of proof is on the respondent employer. Following the Board's normal procedure the respondent was required to proceed first and adduce evidence which will establish, on the balance of probabilities, that it did not breach the provisions of *The Labour Relations Act* in its dealings with the grievor.

6. Extendicare denied having made or instigated the numerous complaints filed against Mrs. Reynolds. It admits that a member of its staff made one complaint and maintains that it does not know the origin of the others.

7. Prior to calling evidence counsel for the respondent advised the Board that her client was at a disadvantage in these proceedings. It appears that the proceedings of the Discipline Committee of the College of Nurses into the allegations against Mrs. Reynolds were held *in camera* and the respondent was not a party. Extendicare maintains that what knowledge it has of those proceedings it gained indirectly through certain members of its staff who were called upon to testify. Since there was an exclusion of witnesses during the hearing that source of information, according to counsel for the respondent, provided the employer with a fairly limited insight into the nature and origins of the complaints which had been made



against the grievor. According to the respondent it has been severely hampered in the preparation of its defence to the allegations in these proceedings because the College of Nurses has steadfastly refused to provide any information whatever as to the identity of the persons who filed the written complaints against Mrs. Reynolds.

8. The first witness called by the respondent was Mrs. Myrna L. Gaffney, the Investigations Coordinator of the College of Nurses of Ontario. Mrs. Gaffney testified that by virtue of her office she was familiar with the complaints filed against Mrs. Reynolds. She testified that the original complaint was dated July 10, 1978 and was received by the College on July 13, 1978. She explained the investigation procedure followed by the College of Nurses upon receipt of a complaint of that kind – the procedure which in fact was followed upon receipt of the initial complaint against the grievor. When a complaint is received by the Complaints Committee of the College, the College undertakes its own confidential investigation of the nurse against whom an allegation has been made. The investigation includes interviews by the College's investigators of present and past colleagues and supervisors of the nurse whose conduct is under scrutiny. It may also include interviews with administrators, patients, other persons in the health care field or anyone who may provide information, either positive or negative, relating to the professional conduct and ability of the nurse under investigation. To get the broadest and fairest view of the performance of the nurse in question, the College's investigators normally interview a sufficient number of persons to provide a profile of the performance of the nurse over a period of 5 years prior to the complaint. The interviews of the investigators are conducted confidentially and the information obtained is treated confidentially by the College. The interviews may result in further written complaints being filed with the College in respect of the nurse being investigated, which complaints are also treated confidentially.

9. Mrs. Gaffney testified that in the case of Mrs. Reynolds an investigation was launched as a result of the initial complaint. She also testified that a substantial number of further written complaints were added to the initial complaint. While she gave the dates of the further written complaints when asked by counsel to do so, she was not asked whether all of the additional complaints were obtained as a result of the College's investigations or whether all or some of them were made independently of the College's investigation.

10. By the terms of the subpoena issued to her, Mrs. Gaffney was required to bring with her and produce at the hearing, among other things, the written complaints received by the College of Nurses of Ontario against the grievor, Ruby Reynolds. Counsel for the College attended at the hearing to advise Mrs. Gaffney of her rights. A witness is entitled to that protection pursuant to section 11(1) of *The Statutory Powers Procedure Act, 1971*, S.O. 1971, c. 47. Counsel for the College stated to the Board that the College had a concern that the parties might seek to elicit from Mrs. Gaffney evidence which is inadmissible by virtue of a common law privilege enjoyed by the College. In light of that submission the Board granted leave to counsel for the College not only to advise the witness but to participate in the hearing to the extent that legal argument regarding the admissibility of certain evidence might be necessary to the full and fair conduct of the Board's hearing.

11. During the course of her examination, counsel for the respondent asked Mrs. Gaffney whether she had brought with her all of the written complaints which the College received against Mrs. Reynolds. The witness answered that she had. When she was further asked whether those documents contain the name or signature of the individual making

each complaint, she confirmed that they did. Upon being asked to provide the names of the persons who made each of the written complaints against Mrs. Reynolds, Mrs. Gaffney replied that upon the advice of her counsel she refused to do so. She was then asked by counsel for the respondent to produce the letters of complaint which she had brought with her. She again responded that upon the advice of her counsel she was obliged to refuse to do so. She elaborated that while she was prepared to disclose the contents of each complaint, the date upon which it was made, and the date of its receipt by the College, she was not prepared to answer any question that would disclose the identity of a complainant or link any individual complainant to a particular complaint. It may be noted that in her responses both to the Board and to counsel, Mrs. Gaffney was polite and courteous at all times.

12. At this point in the proceedings the Board invited argument from the parties and from counsel for the College as to the relevance and admissibility of the answers and documents which the witness refused to provide.

13. Only counsel for the College questioned the relevance of the questions and documents. The Board has some difficulty in understanding that position and must agree with counsel for both the respondent and the complainant that the identity of the persons who made written complaints respecting the professional competence and conduct of the grievor is patently relevant and material to the complaint before the Board. The burden in these proceedings is upon the respondent employer. It has no knowledge of the confidential investigations conducted by the officers of the College and was neither a participant nor an observer in the hearings of the Disciplinary Committee respecting Mrs. Reynolds. As the Board noted above, counsel for the respondent submitted that it had knowledge of only one complaint having been filed with the College by a member of Extendicare's staff. In these circumstances the written complaints and the identity of the complainants would be of considerable probative value. Simply put, if the documents being withheld by Mrs. Gaffney should establish that all but one of the complaints were filed by persons unrelated to the respondent, it might provide a substantial, if not complete, answer to the charges made against Extendicare. For the foregoing reasons the Board determined at the hearing that the answers and documents sought from Mrs. Gaffney by counsel for the respondent were relevant to the inquiry before the Board.

14. The burden of the argument made by counsel for the College was that even if relevant, the names of the complainants and the signed documents of complaint should be found inadmissible by virtue of a common law privilege. The College drew to the Board's attention certain provisions of *The Health Disciplines Act, 1974*. That statute provides for the self-regulation of five professions in the field of health care: medicine, nursing, dentistry, pharmacy and optometry. The Act vests supervisory authority in the regulatory body of each of the professions to investigate and impose discipline upon the professional misconduct or incompetence of its members. The Act establishes an office of Registrar within the College of Physicians and Surgeons of Ontario, and also within the Royal College of Dental Surgeons of Ontario, the College of Optometrists of Ontario and the Ontario College of Pharmacists. By the provisions of sections 40, 64, 110 and 136 of the Act the Registrars of those colleges are given broad powers of investigation into alleged acts of professional misconduct or incompetence by a member of their College. Each of the sections is identical to section 40 which provides as follows:

"40. – (1) Where the Registrar believes on reasonable and probable

grounds that a member has committed an act of professional misconduct or incompetence, the Registrar may by order appoint one or more persons to make an investigation to ascertain whether such an act has occurred, and the person appointed shall report the result of his investigation to the Registrar.

(2) For purposes relevant to the subject-matter of an investigation under this section, the person appointed to make the investigation may inquire into and examine the practice of the member in respect of whom the investigation is being made and may, upon production of his appointment, enter at any reasonable time the business premises of such person and examine books, records, documents and things relevant to the subject-matter of the investigation, and for the purposes of the inquiry, the person making the investigation has the powers of a commission under Part II of *The Public Inquiries Act, 1971*, which Part applies to such inquiry as if it were an inquiry under that Act.

(3) No person shall obstruct a person appointed to make an investigation under this section or withhold from him or conceal or destroy any books, records, documents or things relevant to the subject-matter of the investigation.

(4) Where a provincial judge is satisfied, upon an *ex parte* application by the person making an investigation under this section, that the investigation has been ordered and that such person has been appointed to make it and that there is reasonable ground for believing there are in any building, dwelling, receptacle or place any books, records, documents or things relating to the person whose affairs are being investigated and to the subject-matter of the investigation, the provincial judge may, whether or not an inspection has been made or attempted under subsection 2, issue an order authorizing the person making the investigation, together with such police officer or officers as he calls upon to assist him, to enter and search, if necessary by force, such building, dwelling, receptacle or place for such books, records, documents or things and to examine them, but every such entry and search shall be made between sunrise and sunset unless the provincial judge, by the order, authorizes the person making the investigation to make the search at night.

(5) Any person making an investigation under this section may, upon giving a receipt therefor, remove any books, records, documents or things examined under subsection 2 or 4 relating to the member whose practice is being investigated and to the subject-matter of the investigation for the purpose of making copies of such books, records or documents, but such copying shall be carried out with reasonable dispatch and the books, records or documents in question shall be promptly thereafter returned to the member whose practice is being investigated.

(6) Any copy made as provided in subsection 5 and certified to be a



true copy by the person making the investigation is admissible in evidence in any action, proceeding or prosecution as *prima facie* proof of the original book, record or document and its contents.

(7) The Registrar shall report the results of the investigation to the Council or the Executive Committee or such other committee as he considers appropriate."

15. The confidentiality of the information gained in the course of investigations conducted by the Registrars of the colleges or persons appointed by them is statutorily protected by sections 41, 65, 111 and 137 of *The Health Disciplines Act, 1974*. The sections, as they apply to the information obtained in the investigations conducted under the sections described above, are identical to section 41 which provides as follows:

"41. – (1) Every person employed in the administration of this Part, including any person making an inquiry or investigation under section 40 and any member of the Council or a Committee, shall preserve secrecy with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry or investigation under section 40 and shall not communicate any such matters to any other person except,

- (a) as may be required in connection with the administration of this Part and the regulations and by-laws or any proceedings under this Part or the regulations;
- (b) as may be required for the enforcement of *The Health Insurance Act, 1972*;
- (c) to his counsel; or
- (d) with the consent of the person to whom the information relates.

(2) No person to whom subsection 1 applies shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry or investigation except in a proceeding under this Part or the regulations or by-laws."

16. Thus the bodies responsible for disciplinary investigations in the fields of medicine, dentistry, optometry and pharmacy have been given broad powers of investigation, including powers of search and seizure. To those powers of investigation the Legislature has attached a statutory shield of confidentiality; the information obtained by the use of those extraordinary powers may not be disclosed except in the limited conditions described in sections 41, 65, 111 and 137 of *The Health Disciplines Act, 1974*.

17. The same situation does not obtain in respect of disciplinary inquiries conducted by the College of Nurses of Ontario. Part IV of *The Health Disciplines Act, 1974*, the portion of the statute relating to the nursing profession, contains no provision granting to the College of Nurses of Ontario the powers of investigation which are given to the colleges of med-

icine, dentistry, optometry and pharmacy. The authority to investigate complaints made against members of the nursing profession is vested in the Complaints Committee of the College of Nurses by virtue of section 82 of *The Health Disciplines Act, 1974*, which provides as follows:

“82. – (1) The Complaints Committee shall consider and investigate complaints made by members of the public or members of the College regarding the conduct or actions of any member of the College, but no action shall be taken by the Committee under subsection 2 unless,

- (a) a written complaint has been filed with the Director and the member whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the Committee any explanations or representations he may wish to make concerning the matter; and
- (b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

(2) The Committee in accordance with the information it receives may,

- (a) direct that the matter be referred, in whole or in part, to the Discipline Committee or to the Executive Committee for the purposes of section 85; or
- (b) direct that the matter not be referred under clause a; or
- (c) take such action as it considers appropriate in the circumstances and that is not inconsistent with this Part or the regulations or by-laws.

(3) The Committee shall give its decision in writing to the Director for the purposes of section 8 and, where the decision is made under clause b of subsection 2, its reasons therefor.”

The only other section in Part IV of the Act relating to investigations is section 85, whereby the Director of the College is authorized to inquire into allegations that a member is under some physical or mental incapacity which would interfere with the performance of his or her duties. Neither under that section nor under section 82 is any body or officer of the College of Nurses of Ontario given the broad powers of investigation vested in the colleges of medicine, dentistry, optometry and pharmacy. Correspondingly, there is not contained within the Act any statutory privilege or protection of confidentiality attaching to information obtained in the course of any investigation or inquiry by the College of Nurses of Ontario. Thus the powers and protections that apply to the investigating authorities of the College of Nurses of Ontario are in these respects different from those that apply to the other professions regulated under *The Health Disciplines Act, 1974*.

18. The granting of the protection of privilege to certain forms of information and

communication by the operation of the common law is a recognition that in certain limited circumstances other considerations may override the value of establishing facts in litigation. Certain kinds of relationships have been deemed sufficiently important and the communication of information within those relationships sufficiently valuable to permit the protection of those communications from disclosure in legal proceedings. The interest of truth, however, is not lightly to be restricted, and the tendency of the courts in the last century has been to narrow the categories of relationships and communications which are deemed privileged at common law to the limited set of relationships where that protection is deemed essential.

19. Three kinds of communication between private persons have been generally recognized as privileged. They are communications between solicitor and client, communications between spouses, and communications made without prejudice with a view to achieving the settlement of matters in litigation. There are as well at common law certain forms of protection given to information deemed valuable to the public interest, including the disclosure of information or documents held by the Crown whose disclosure might be contrary to national security or to the public interest, information obtained in the course of the detection of crime and information from judges or jurors respecting proceedings before them. (See, generally, Sopinka and Lederman *The Law of Evidence in Civil Cases*, Toronto, 1974 pp. 156-264).

20. Because the information in question in this case is not privileged by virtue of statute, it must find its protection, if any, at common law. The only one of the above categories of common law privilege which might be said to apply, even by analogy, to the investigations of the Ontario College of Nurses is the privilege attaching to information obtained in the course of the investigation of crime. A survey of the authorities by this Board suggests that the head of privilege attaching to criminal investigations has not been broadly expanded to protect investigations relating to civil actions or to the inquiries of licensing authorities or other bodies charged with the regulation of the status of persons or institutions. As a general rule, apart from the established categories, there is no privilege to prevent the disclosure in legal proceedings of information received by statutory administrative bodies save such protections as may be granted within their statute.

21. The protection attaching to information obtained in the course of investigations of the colleges of medicine, dentistry, optometry and pharmacy under *The Health Disciplines Act, 1974*, is not a codification of the common law. It is in fact a broad prohibition of disclosure – something more than a mere evidentiary privilege. The investigators of those colleges, unlike the officials of the College of Nurses, have been granted powers of search and seizure, including the use of search warrants, which are similar to the powers of investigation vested in police authorities. Because of the range and sensitivity of information that the investigators will encounter in the course of investigating a private practice or business the prohibition against disclosure of that information is a necessary adjunct to the extraordinary powers of investigation vested in the colleges of medicine, dentistry, optometry and pharmacy. The protection given appears to operate as much in the interest of the individual investigated as in the interest of the investigating body.

22. The Legislature may have declined to incorporate similar powers of investigation within Part IV of the Act because registered nurses generally do not conduct a private practice or business. Whatever the reason, neither the powers of search and seizure given to the



other colleges nor a correlative blanket of confidentiality were vested in the College of Nurses of Ontario by statute, and there is no authority establishing the existence at common law of the privilege respecting information asserted in these proceedings by the College.

23. The Board is satisfied, therefore, that the information obtained by the College of Nurses of Ontario in the investigation of Mrs. Reynolds is not privileged by statute or by common law. The information sought from Mrs. Gaffney, found to be relevant, is therefore admissible and, having regard to the issue in these proceedings, it ought to be admitted. The Board is not unaware of the practical concerns expressed by the College. While no request was made to have the testimony of Mrs. Gaffney heard *in camera*, the Board would, having regard to the provisions of section 9(1) of *The Statutory Powers Procedure Act, 1971* and to the sensitive nature of the information in question, be prepared to entertain the submissions of the parties or of the College of Nurses of Ontario that the testimony of Mrs. Gaffney, or any part of it, be heard *in camera*.

24. At the hearing the Board made an oral ruling that the answers and documents in issue were relevant and admissible. Having done so the Board gave counsel for the respondent the opportunity to again put the questions in issue to the witness. The following questions and answers were then recorded:

1. Q: Who were the authors of the written complaints from colleagues and co-workers which were the foundation for the letter of September 14, 1978? (Exhibit 1 in these proceedings)

A: I cannot answer that upon the advice of my counsel.

2. Q: Have you brought with you today the documents listed in item 1 of the summons which was served upon you?

A: Yes I have.

3. Q: Will you produce them?

A: No. I am sorry. On the advice of my counsel I cannot produce them.

4. Q: In answering the previous question were you referring to the written complaints?

A: Yes, I was.

5. Q: Are those complaints signed and would they disclose the names of the individuals making the complaint?

A: Yes, they would.

6. Q: Do you have with you the documents requested in item 5 of the subpoena; namely, all notes, records and documents pertaining to the investigation of the Complaints Committee and/or its representative into the conduct and activities of Ruby Reynolds arising

out of the complaints filed pursuant to section 82 of The Health Disciplines Act, 1974?

A: Yes, I have brought them with me.

7. Q: Will you produce such documents?

A: No. I am sorry. On the advice of my counsel I will not.

8. Q: Do you refuse to disclose the names of the individual complainants in relation to the complaints made as they appear in the documents?

A: Yes, I do.

25. At this point in the proceedings the Board read to the witness the provisions of section 92(2)(a) of *The Labour Relations Act* which are as follows:

“92(2) Without limiting the generality of subsection 1, the Board has power,

(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;”

26. The Board then ordered the witness to answer all of the above questions. When the witness remained silent, the Board asked:

Q: Will you obey the Board's order to answer the questions?

A: No. I am sorry. On the advice of my counsel I cannot.

The Board then stated to the witness that it found her to be in breach of an order of the Board. The Board then invited submissions from the parties as to the course to be followed for the purposes of punishment.

27. Counsel for the respondent requested that the Board state a case to the Divisional Court. Pursuant to section 13 of *The Statutory Powers Procedure Act, 1971*, the Board consented to refer to the Divisional Court the matter of the punishment appropriate in light of the witness' contempt in the face of the tribunal. Upon agreement of the parties the hearing was adjourned pending the reference to the Court.

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**1885-78-U** Patrick Gain and David Smith, (Complainants), v. Local 1565 of the International Brotherhood of Electrical Workers, (Respondent), v. **Great Lakes Forest Products Limited**, (Interested Party).

**Duty of Fair Representation – Union refusing membership to employees legally required to cross picket lines – union intending to punish employees honouring collective agreement or forcing settlement of jurisdictional dispute – no valid collective objective by discriminating against complainants – whether improper collective objective forming basis of section 60 violation.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

**APPEARANCES:** *J. D. Young for the applicant; W. V. Dubinsky and A. Nowak for the respondent; G. L. Firman for the interested party.*

**DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; July 5, 1979.**

1. The name “International Brotherhood of Electrical Workers, Local 1565” appearing in the style of cause of this complaint as the name of the respondent is amended to read: “Local 1565 of the International Brotherhood of Electrical Workers”.
2. The complainants allege contraventions of sections 38, 60 and 61 of the Act by the respondent union.
3. Great Lakes Forest Products Limited (hereinafter referred to as “Great Lakes”) which is the employer of both complainants is joined as a party to these proceedings.
4. Great Lakes has collective agreements in respect to five separate bargaining units of employees at this location. The complainants, prior to and subsequent to the acts complained of, were in the bargaining unit represented by the Canadian Papermakers Union, Local 39, and were, at the time of the acts complained of, working in another bargaining unit, to which they had been transferred on October 16, 1978, represented by the respondent union.
5. Smith and Gain, who were both employed in the Local 39 unit, individually and independently expressed an interest to the Chief Electrical Engineer in August 1978 in transferring to the Electrical Department as apprentices. At the time of their initial contacts, no openings existed but they were asked to file applications, which they did. Some time in the second week of October they were advised by the company that they had been accepted and were to commence their new duties on October 16, 1978.
6. It should be noted that there has been a long history of persons transferring from the unit represented by Local 39 to the unit represented by the respondent under similar circumstances. In fact, of the 70 to 75 persons employed in the Electrical Department, some 24 of them completed or are completing their apprenticeship under the company program and 14 of these 24 have come from Local 39. It should also be noted that the Local 39 collective agreement has a proviso, (Article 8), as follows:



“Any member of the Union who is promoted to a position within the Mill, outside of the jurisdiction of his Union, shall be permitted to be a dues-paying, non-participating member of the Union for a period of six (6) months.”

A similar clause was incorporated in the renewal amendments to the Local 1565 agreement.

7. During the summer and fall of 1978 renewals of collective agreements were being negotiated by each of the five unions involved, and in respect to Local 1565 of the IBEW, a legal strike was commenced on September 20, 1978 and was terminated on September 27, 1978 by the parties coming to agreement on terms for a renewal contract. During the period of the strike, production was virtually stopped although, in the words of Nowak, President of Local 1565, hundreds of people from Local 39 went to work through the picket line. Smith, who was employed in the Kraft Mill, testified that his entire shift, including the union steward, was at work throughout.

8. Smith testified that he and Gain reported for work as apprentices in the Electrical Department on October 16, 1978 and were turned over to a foreman who assigned them to separate journeymen. On that day, Nowak asked Smith if he could see his pay stub for the preceding pay period. Nowak did not indicate why he wanted to see the stub, although in his evidence he states it would have given him basic information which would permit him to check on Smith's background. In any event, Smith did not have the stub with him and agreed to bring it in the following day. Smith states that he phoned Nowak at his home on October 16th or 17th and suggested to Nowak that Nowak's interest in the pay stub was to ascertain whether Smith had crossed the picket line during the strike and Smith confirmed to Nowak that he had done so. According to Smith, Nowak then indicated that this was a problem which would have to be discussed at the union meeting on October 17th but that it was Nowak's judgment that Smith would not be allowed in as a member. Nowak, in his testimony, does not recall telling Smith that crossing the picket line could be a problem and states that, throughout, the union was not too concerned about people going through the lines and that they (the union) were well aware that hundreds had done so from Local 39. Nowak testified that he distinguished between crossing the lines versus working during the strike and that he did have some interest in the latter. On October 18th Nowak, according to Smith, informed Smith that the decision had been made that any member of any union who crossed the picket line during the strike would be refused membership and that the decision was not personal to Smith but applied to everyone.

9. Gain testified that he was approached by Nowak and also asked for his pay stub on October 16th which he undertook to bring in the following day but forgot to do so. On October 18 Gain returned a phone call from Nowak who renewed his request to see the stub and when Gain stated he didn't think it was any of Nowak's business, Nowak then asked if he had crossed the picket line. Gain maintained his position that his activities while with Local 39 were of no concern to Nowak. Nowak then stated that Gain would be assumed guilty until he proved his innocence. Gain agreed to meet Nowak after work and, at that time, informed Nowak he had crossed the picket line and Nowak "indicated because of that it was almost certain I wouldn't be permitted to join the union". Nowak, in his evidence, when asked whether he ever raised the matter of crossing the picket line with Smith and Gain replied, "No".

10. On October 23, 1978 Nowak wrote to Murray, Personnel Supervisor, as follows:

“The recent introduction of P. Gain and D. Smith as apprentices into the Electrical Dept. has met with strong opposition by our people for reasons outlined at meetings with the company.

Is it the company’s intention to try to force these people on us in spite of our position?”

The company in a letter to Nowak dated October 31st stated:

“You have advised us on Wednesday, October 18th, that Dave Smith, an electrical apprentice was discussed at the Union meeting on Tuesday, October 17, 1978, and his status as an electrical apprentice met with strong opposition by Local 1565.

At the same time, you indicated that Mr. Smith’s application for membership in Local 1565 would probably not be accepted since if only one member of the Union objected to the application, it would be denied. Although Pat Gain was not considered at the same meeting, we understand that the same position will probably be taken with respect to Mr. Gain at the next meeting of the Union.

Apparently, these two employees will be denied membership in Local 1565 because they crossed the picket lines of Local 1565 most recently when that same Local was engaged in a legal strike against the Company. At that time, both Mr. Smith and Mr. Gain were members of Local 39 which had a legal contract with the Company and therefore both employees were required to cross the picket lines and attend at work or else face disciplinary measures by the Company.”

11. Nowak replied to this letter on the same date and said, in part,

“You refer in this letter to a meeting on Oct. 18, 1978, at which Mr. D. Smith’s apprenticeship was discussed. We wish to point out, that the interpretation of that meeting in your letter is entirely yours, not ours.”

and further,

“We fail to see what actions by the Union can jeopardize the continued employment of Mr. Smith and Mr. Gain.

It never has, is or will be the intention of Local 1565 to prevent these gentlemen, or anyone else, to be continuously employed as electrical apprentices.”

12. Smith and Gain continued working in a normal fashion, without incident, until November 22, 1978 when Smith was told by Gain that Gain had been advised “other electrical workers would not work with them”. Smith and Gain then went to see Fiurito, the union steward who asked to speak privately to MacDonald, the foreman, who was then present. MacDonald subsequently informed Gain and Smith that he wasn’t sure what was going

on and that Smith and Gain should work at cleaning sub-stations until he found out. Smith and Gain continued at this type of assignment for the balance of the week.

13. The next regular monthly union meeting was held on November 21st.

14. On November 22nd, Fiurito gave Smith and Gain application for membership cards asking that they be filled out "for all the good they'll do". Smith and Gain completed the cards and returned them to Fiurito.

15. On November 28th Nowak delivered letters to Smith and Gain stating:

"This is to inform you, that your recent application for membership in Local 1565 of the I.B.E.W. has been rejected."

On November 28th Gain was assigned to work with a journeyman electrician with whom he had previously worked, but who, on this occasion, ignored him and did not permit him to participate in the work. From then through until December 7th Gain testified that he met with refusals from journeymen to work with him and on such refusals he would be re-assigned by the foreman to sub-station cleaning. On December 5th Gain was assigned to Nowak, President of Local 1565, who stated: "You can follow me around if you like but I'm not going to work with you". On December 6th, Gain was assigned to Fiurito, Shop Steward, who told him: "You've got two choices. Either come along and we'll simply tell management you are incapable, or I can just tell you I won't work with you". Gain's reply was, "You might as well tell me you won't work with me".

16. On November 29th Smith worked with millwrights outside of the IBEW unit. He was told by a foreman that the company had decided to give warning notices to any journeyman electrician refusing to work with him or Gain. On November 30th and December 1st, Smith was assigned to journeymen electricians who refused to work with him and to whom warning letters were issued. Smith spending the balance of the day on sub-station cleaning. On December 4th Smith was assigned to cleaning and on December 5th to putting warning stickers on transformers in the Kraft Mill sub-stations. On entering the sub-station he met the foreman who told him he "had better go to another sub-station because if some of the journeymen saw me they might walk off the job and that the company didn't want any more trouble".

17. In all some 8 or 9 written warnings were issued during this period to journeymen for refusal to work with Smith or Gain.

18. Smith went to see Nowak after work on December 6th as he had been requested to do by Vitassi, a steward, and Gain was already present. Nowak stated that the union's position was that the issue should go to arbitration and that he had suggested to the company that Smith and Gain be assigned to work by themselves for 3 or 4 months until their applications could be reconsidered by the union but that the company would not accept this proposal. Nowak said that from his experience if Smith and Gain returned to their old jobs and eliminated the warning letters, their chances would be much better than if they stayed and prolonged the issue.

19. On December 7th Smith and Gain decided that they could no longer work in the



environment which was affecting their personal lives and with potential for others being fired and with no resolution in sight. Accordingly, they went to Murray, the Personnel Superintendent, and told him they wished to go back to their old jobs, and such transfers were arranged.

20. At the regular union monthly meeting held on November 21st the matter of admitting Smith and Gain to membership was discussed, although, as we have noted above, no formal applications for membership had been made at that time. According to Nowak, the matter was introduced because of Murray's insistence that a decision be made on membership. Nowak also states that, prior to this, he had endeavoured to secure information regarding Smith's and Gain's qualifications from them but they were reluctant to give any information, and that, similarly, information had been sought from Murray with no response. Nowak further states that he had learned somewhere that they had worked during the strike and that some Local 1565 members had made known their concern in this regard to him.

21. The November 21st meeting was attended by some 30-40 members and, according to Nowak and Fiurito, the status of Gain and Smith was discussed in the same format as was usual in respect to applicants for membership and, as provided for in the union's Constitution. A motion was carried that if they applied they would be rejected. The motion was not unanimously supported.

22. Nowak, in response to the question, "Any discussion on November 21st to their crossing picket lines?" replied, "No, sir". On cross-examination, question was put to him as follows:

Q. Rejected because crossed picket line.

A. No.

Q. Was it part of reasons?

A. Not in my mind.

Q. Rejected because they worked?

A. You are asking me to tell you why other members voted as they did.

Murray, in his testimony, states that he was approached on November 23rd by Fiurito and Nowak and told that at the general membership meeting of November 21st the unanimous decision of the membership was that should the electrical apprentices Gain and Smith apply later, they would be rejected because they had crossed the picket line. On the same day, Murray spoke to Gain and Smith and learned that Gain had been assigned to work with a journeyman electrician, Sandberg, who told him he couldn't work with him because of a union directive. This latter information caused Murray to call a meeting on November 24th with the Vice-President - Operations, Vice-President - Engineering and Chief Electrical Engineer and the decision was made that if the IBEW persisted in this, the company would have to take disciplinary action. On November 27th or 28th Murray received copies of the letters sent to Smith and Gain advising them of the rejection of their applications. On No-

vember 29th warning letters were issued to five journeymen electricians (including Nowak) for “disobedience and neglect of duty – refusal to follow supervisor’s instruction to work with apprentice”. On December 1st two further similar warnings were issued and on December 5th a warning for the same reason was issued to Fiurito. We were told that subsequently one notice was recalled and that all others remain active in the grievance procedure.

23. It is evident that relations between Local 1565 and the company since the strike settlement have been strained and that Local 1565 views Local 39 as encroaching on work which should be performed by Local 1565 members. Murray testified that immediately following the strike, three members of Local 1565 were given disciplinary suspensions which are now proceeding to arbitration and that there had been more grievances filed by the IBEW since that time than in the total history of the company. Additionally, grievances have been filed by the company against the union and an unfair labour practice allegation against the company has been filed by the union, and a complaint filed respecting work encroachment by Local 39.

24. Additionally, Local 1565 considers that the right to contract out work previously done by Local 1565 is increasingly exercised by the company to narrow down the union’s available work.

25. It is also evident that Local 1565 did not want to see the complainants employed in the bargaining unit and that this was discussed with the company on October 18th and was confirmed in Nowak’s letter of October 23rd. What is not so evident is the real reasons behind the union’s attitude. Whether that attitude was based on the sheer fact that they had crossed the picket line (which they were legally obligated to do), or whether it was grounded on the fact, alluded to by Nowak, that during that period they had performed work which might have fallen under Local 1565’s jurisdiction, it is clear to us that the opposition to their presence in the unit was related to the work-related events of the period during which Local 1565 was on strike.

26. It is suggested in argument that there had been a breach by the company of its obligations under the collective agreement to consult with the union prior to hiring and to provide information subsequently. We note that Murray in his testimony stated that the usual hiring procedure was followed in this case and that the company has never had any complaint about the procedure. Also, Nowak when asked if there had been anything unusual in the assignment of Smith and Gain, stated, “Not at the point of assignment. There have been times we have been asked, but not on all occasions”. As to providing information to the union, Murray stated he had no personal knowledge in this instance but that there is an established liaison and routine between the union and the Timekeeping Department.

27. A question of fact to be determined by the Board is whether the refusals of journeymen to work with Smith and Gain was undertaken in furtherance of the union’s opposition to their employment. Despite the disclaimer in Nowak’s letter of October 31st, there are several indications in the evidence to the contrary, including Nowak’s testimony to the effect, “You have to understand that after the meeting of November 21 at which their membership applications were rejected, our members found themselves in a position of being asked to work with someone not a member of the union”. Nowak went on to put his personal refusal on the grounds of safety. Fiurito, the Chief Steward, in explaining his refusal, stated, “I viewed bringing in apprentices at this time was to undermine the union. It’s con-

ceivable that they could train for a period and have returned back to their old unit and then would have had some training to do electrical work". There was also the meeting of December 6th (some 7 days after the refusals to work with Smith and Gain started to result in warning notices) held on company premises at which Vitassi, a shop steward, informed Smith that he, Vitassi, had suggested that Smith and Gain be permitted to become members, be fined and given some "union education" and for which suggestion he was hooted down and invited to resign as steward. Finally, it was as a result of Murray learning on November 23rd that Sandberg, a journeyman electrician, had refused to work with Gain because of a "union directive" that the company decided to administer discipline. In our view, the refusal of journeymen to work with Smith and Gain was a concerted refusal, constituting an unlawful strike, and was in opposition to their employment as apprentices, and led to their request for transfer back to their old jobs. Nowak when asked whether he could have worked under the conditions that Smith and Gain worked under, replied, "I would not have stayed as long as they did. It was a concern to me".

28. The issue before us is whether the circumstances constitute a contravention of section 38(2) which prohibits a trade union from requiring the employer to discharge an employee for non-compliance with a requirement of union membership as a condition of employment, where such non-compliance arises out of the union's removal or refusal of such membership for those reasons enumerated in section 38(2)(c), (d), (e), (f), and (g).

29. The collective agreement between Great Lakes and Local 1565 in Article 5 requires all permanent employees to become members of the union within six months after entering the company's employ, and to maintain membership in good standing. Smith and Gain entered the electrical department on October 16, 1978 and under the terms of this Article, could be required to join the union and maintain membership from April 16, 1979 onwards. Prior to April 16, 1979 no membership conditions attached. If the Board were to conclude that the conduct of the union, here, in refusing membership fell within the reasons enumerated in sections 38(2)(c) to (g), there would remain the question as to whether the trade union required the employer to discharge the complainants because of such lack of membership.

30. The relevant provisions of section 38 read as follows:

"38(1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in it provisions,

- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;
- (b) for permitting an employee who represents the trade union that is a party to or is bound by the agreement to attend to the business of the trade union during working hours without deduction of the time so occupied in the computation of the time worked for the employer and without deduction of wages in respect of the time so occupied;



- (c) for permitting the trade union that is a party to or is bound by the agreement to use the employer's premises for the purposes of the trade union without payment therefor.

(2) No trade union that is a party to a collective agreement containing a provision mentioned in clause *a* of subsection 1 shall require the employer to discharge an employee because,

- (a) he has been expelled or suspended from membership in the trade union; or
- (b) membership in the trade union has been denied to or withheld from the employee,

for the reason that the employee,

- (c) was or is a member of another trade union;
- (d) has engaged in activity against the trade union or on behalf of another trade union;
- (e) has engaged in reasonable dissent within the trade union;
- (f) has been discriminated against by the trade union in the application of its membership rules; or
- (g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable."

31. Relief pursuant to the section is predicated upon the existence of three elements. There must be a union security clause in force of the kind contemplated by section 38(1)(a), the trade union, relying on the clause, must have required the employer to discharge the employee and the trade union must have denied membership to the employee for one or more of the reasons proscribed by section 38(2)(c) to (g). The whole thrust of the section is to permit union security provisions but to preclude the trade union from requiring the employer to take action under such clause, thereby interfering with the employment security of an individual, if the reason for the individual's non-membership in the union falls within any of those reasons set out in section 38(2)(c), (d), (e), (f) or (g). The section falls short of interfering with the union's conduct of its internal affairs and at the same time limits the applicability of the results of such conduct within the collective bargaining agreement. It is not the denial of union membership, per se, which the section is directed against but rather that such denial shall not be used as the basis for requiring the employer to apply the union security provisions.

32. In the instant case, the application for relief alleging a violation of the section is premature. The section clearly contemplates a direct causal relationship between the requirement to discharge and the existence of a union security clause. The very use of the word "require" connotes a legal obligation on the employer to accede to the trade union's request. Absent the operation of a security clause, the trade union would be in no position

to “require” any action by the employer and the employer would be under no legal obligation to act upon any request made.

33. Here, the security arrangement did not impose a legal obligation upon either the employees to join the union or the employer to discharge employees failing to obtain membership until some six months following the commencement of work by the employees. During the period of time framed by this complaint, the trade union was without any legal foundation upon which it could compel the complainants’ discharges. That time period had not run and the union was not therefore in a position, at all relevant times, to require the discharge of employees pursuant to the contract, and, in fact, the evidence does not establish that the union at any time did require of the employer that discharges be effected in compliance with that clause.

34. Counsel for the complainant refers the Board to language in an arbitration case, *Orenda Engines Ltd. and Machinists*, (1958) 8 LAC 116 which deals with the obligation on the union to supply details of the reasons for denial of union membership where the union was seeking to require the employer to apply a union security provision. In our view, while we are in accord with the principles therein enunciated, such principles could only be helpful were we faced with a similar factual situation. In the instant case, as noted above, the evidence does not support the contention that the union had required any action under the union security provisions.

35. The Board is also referred to what appears to be the only case in which this Board previously considered a complaint involving section 38 of the Act. See *Walker and McAnnally Freight-Ways*, 64 CLLC ¶16,011. In that case an employee proceeded against his employer alleging that he had been discharged from employment in contravention of the section. Again, because that case raised no issue as to whether the employer had been “required” to act under the union security provision, we do not find it helpful in the instant case.

36. We are of the opinion for the reasons above discussed that we must find no contravention of section 38 has taken place.

37. We turn now to the allegation that the facts support a conclusion that there has been a contravention of section 61 of the Act which reads:

“61 No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.”

38. As set out in the Board decision of *Andrew Warren*, [1976] OLRB Rep. Jan. 963, it is necessary in order to establish a contravention of section 61 that two elements be established, i.e., that there has been intimidatory or coercive conduct and that its purpose was either “to compel any person to become or refrain from becoming a member or to continue to be or to cease to be a member of a trade union ...” or “to refrain from exercising any other rights” under the Act.

39. Even if the Board were to find that the first element, i.e., intimidatory or coercive conduct existed, the question still to be determined is whether the purpose of such conduct was to compel any of the enumerated objectives of section 61. The evidence is that the complainants worked without problems or incidents between October 16th and November 27th, except for their assignment to non-bargaining unit work on November 22nd following a discussion (contents of which were not made known to the Board) between their foreman and a union steward. It was on November 21st that a union meeting approved a motion that if the complainants applied for membership they would be rejected, and on November 22nd that they were invited to file formal applications for membership and on November 28th that they started to encounter refusals by journeymen electricians to work with them. It would be this latter conduct, if any, which might be perceived as coercive or intimidatory.

40. It is clear from the evidence that the respondent, for whatever reasons, had as early as October 23rd decided that it did not want to have the complainants "forced" on them. We interpret that as meaning that either the union did not want them as members, which was the union's right so long as they did not seek their discharge pursuant to the union security provisions and in contravention of section 38, or, alternatively, that the union did not want them employed as apprentice electricians. It should therefore be inferred that any subsequent union conduct was directed to achieving one of these objectives. Inasmuch as the question of membership had been determined as of November 28th, the Board can only infer that the activities, however they are to be evaluated, that ensued from November 28th onward can only have been designed to force the removal of the complainants as apprentice electricians. The next question to be decided by the Board is whether this objective constituted an interference with the complainants' rights under the Act. The fact that the conduct of November 28th onwards was not designed to preclude the complainants from becoming members (that issue having been decided) but to preclude them from working in the bargaining unit, differentiates the present case from *International Brotherhood of Electrical Workers*, [1967] OLRB Rep. Sept. 586. There, the complainant was forcibly prevented from writing an examination which was a pre-condition to membership. In that case the Board found that the intimidatory conduct precluded the complainant's "equal opportunity to join the union" which was the bargaining agent for the unit in which he was employed, and which conduct was directly intended to compel the complainant to "refrain from becoming a member" and so falling within the specific language of the section.

41. The Board finds no right of the complainants created by the Labour Relations Act which is interfered with by the complained of conduct. It may be under the collective agreement that this constituted an interference with the employer's rights to select and hire employees and/or to assign work and if this be so, it is incumbent on the employer to take such steps as are deemed necessary. While the complainants might well be the beneficiary of a successful enforcement of employer rights, it does not create any right of itself in the complainants.

42. The Board does not find a contravention of section 61 of the Act.

43. The remaining question is whether there has been a contravention of section 60 of the Act.

44. Section 60 sets out the legal limitations imposed on a trade union in its representation of employees in the bargaining unit. The immediate question which arises is to define



what is encompassed in "representation". On its face, representation involves acting on behalf of employees in dealings with the employer. Hence, the most usual complaints which arise out of the representational process are those which are grievance-founded complaints over rights derivative of the collective agreement or bargaining process complaints relative to the impact on individual employees of the general terms and conditions of employment bargained for the total bargaining unit. In both types of cases, the bargaining agent which has been granted exclusivity to deal with the employer on behalf of all employees must often transcend the particular interests of individual members of the unit in the interest of arriving at a collective position which can be supported in negotiations with the employer. So long as this process of integrating the individual interests into a collective viewpoint takes place without arbitrary, bad faith or discriminatory treatment of any individuals in the bargaining unit, it is accordance with the bargaining agent's statutory obligations.

45. The question here is whether the representational responsibilities of the exclusive bargaining agent extend beyond servicing an employee's interest in a perceived complaint against employer treatment. In our view, the representational function includes the total process by which the employment interests of individual employees are reconciled and integrated into a collective whole by the bargaining agent, and section 60 of the Act prescribes the outer limits to the manner in which this process may be exercised.

46. It is clear in this case that Gain and Smith had no action or non-action of the employer about which they would seek to complain and have corrected. Their complaint, if any, must be that they were precluded from performing the work assigned them by their employer by the actions of the respondent, and in the ultimate were forced by the circumstances created by the respondent to abandon their employment relationship. In our view the complainants had a right to expect that their employment interests would be protected by the respondent and would only be modified to the extent necessary to achieve a legitimate collective goal and then only in a manner which was not arbitrary, discriminatory or in bad faith. The evidence is that the respondent took a number of steps including resort to an unlawful strike to accomplish the demise of the complainants' employment relationship and this, surely, can only be characterized as the antithesis of protecting the complainants' employment interests.

47. It is many times necessary for a bargaining agent to forego advancing the interests of individual employees in the short or long-term interests of the collective whole. It seems to us that if the respondent was here acting for the achievement of any collective interests, such interests can only be identified as being to create a general awareness that the respondent was strongly opposed to persons crossing its picket line, or alternatively, that the respondent was seeking the collective good by using the complainants' employment as a lever with the company to halt what the respondent viewed as job erosion within its unit.

48. In respect to the former objective which, in effect, is founded on an objection to the complainants' fulfillment of legal obligations to honour their own collective agreement, it is not in our view a permissible collective objective. In respect to the alternative objective relating to job erosion, the respondent had both contract arbitration and a provision in the contract for the settlement of jurisdictional disputes which were available to them and which could have been pursued in place of destroying the complainants' employment interests.

49. In our view, collective objectives of the above type cannot be considered as valid or relevant factors in integrating the complainants' employment interests with the interests of those of the collective whole. Decisions which are based on irrelevant facts or principles are arbitrary within the meaning of section 60 and we therefore find that the respondent has contravened section 60 of the Act.

50. The Board orders and directs that the intervening employer reinstate the complainants in their employment as electrician apprentices upon application for such reinstatement by them. Such reinstatement shall be made effective as soon as the employer has need for the filling of job vacancies in the classification of electrician apprentices.

51. The Board further orders and directs the respondent union, upon reinstatement of the complainants, to cease and desist from all conduct which affects the complainants' employment interests differently from that of other persons employed as electrician apprentices.

52. The complainants seek compensation for the time during which they were prevented from working as electrician apprentices. Electrician apprentices, under the collective agreement, commence employment at a wage rate equivalent to 60% of that paid to a journeyman which is substantially below the rates the complainants earn in the Local 39 bargaining unit and move progressively over the period of apprenticeship in six-month increments. Thus, it would be some 24 months before the apprentice rate paid to Smith would exceed his present rate of earnings and some 30 months in the case of Gain. During the period October 6, 1978 to such time as Smith and Gain are re-instated as apprentice electricians, they have been working in the Local 39 unit at rates of pay appreciably higher than those which would apply to apprentices. Such increased earnings in our view, offset the fact that the respondent's action has postponed the possible time when they could achieve the journeyman electrician's rate. This is particularly so in view of the fact that ultimate achievement of journeyman's rate and completion of apprenticeship are by no means a certainty but could be defeated as a result of many contingencies, some of which could be attributable to the employees themselves. We are of the opinion that any monetary loss postulated on the deferral of the time when the complainants might have achieved journeyman's rate is too remote to form the basis of a direction by this Board.

#### **DECISION OF BOARD MEMBER M. J. FENWICK:**

1. I disagree with the decision of the majority as set out in paragraphs 49 to 51 inclusive dealing with alleged violation of Sec. 60 by the respondent union.

2. In my view the company is the "Villain" in the incident. It transferred Gain and Smith to the electrical department which is represented by Local 1565 without consulting that union and in the tense aftermath of a strike by the local against the company. The union had every reason to suspect that the company was trying to contract out its work to employees from another department and members of another union.

3. Gain and Smith in my opinion failed to show how Local 1565 acted in bad faith in representing them. They filed no grievance against the employer. Local 1565 was not called on to represent them in that respect.

4. It is common practice in the various trades that joint union management apprenticeship programs are undertaken. In this instance the company failed to follow a contractual obligation to consult with Local 1565. As a consequence I would have dismissed the complaint.

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**0569-79-R** United Cement, Lime and Gypsum Workers International Union, AFL-CIO-CLC, (Applicant), v. **GTE Sylvania Canada Limited**, Electronic Components & Systems Division, (Respondent).

**Certification – Petition – Plant Manager addressing employers requesting they carefully consider certification and expressing disappointment about joining trade union – Comments not intimidating nor coercive – petition found voluntary change of heart.**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members D. B. Archer and E. C. Went.

**APPEARANCES:** *Donald G. Burshaw, Ronald Burshaw and Daniel Houston for the applicant; Brian W. Burkett and R. Healey for the respondent.*

**DECISION OF THE BOARD;** July 11, 1979

1. This is an application for certification.
2. The name “G.T.E. Sylvania Limited (C.M.O. Electronics Limited)” appearing in the style of cause of this application as the name of the respondent is amended to read to read “GTE Sylvania Canada Limited, Electronic Components & Systems Division.”
3. The Board finds that the applicant is a trade union within the meaning of section 1(l)(n) of The Labour Relations Act.
4. Having regard to the representations of the parties, the Board further finds that all employees of the respondent located in the City of Belleville, Ontario, County of Hastings, save and except foreman and supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied, on the basis of the evidence before it, that more than 55% of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 3rd July, 1979 which is the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. There was also filed with the Board a timely statement of desire, in the form of a petition, which complies in form and substance with Rule 48 of the Rules of Procedure. In accordance with its usual practice, the Board undertook the enquiry contemplated by Rule 48(5) and heard evidence concerning the origination of the petition, and the manner in which each signature thereon was obtained. The Board heard the evidence of Mr. Donald Francis who explained how he and certain other employees set about to oppose the union's



certification. Mr. Francis explained that he drafted the statement in opposition, and on June 27th, during the lunch break, solicited the support of the other employees. Two further signatures were added the following day. There has been no expressed, or tacit, managerial support for the petition, nor was actual management involvement alleged. Mr. C. M. Osborn, the plant manager, did address the employees; however, his comments were restricted to a request that the employees carefully consider the certification proceeding since it affected all of them, and an expression of disappointment that they considered it necessary to formalize the employer/employee relationship by joining a trade union. We are not satisfied that these comments are intimidatory or that they created a coercive atmosphere in which employees would be concerned about their job security. In all the circumstances, we are satisfied that when employees signed this petition they were expressing a genuine and voluntary "change of heart" about their union membership and were not motivated by a concern for their job security, or a fear that their failure to signify opposition to the union would be communicated to the employer, and might result in adverse consequences. We are satisfied that the petition is voluntary and that, accordingly, we should exercise our discretion to order a representation vote.

7. The matter is referred to the Registrar.

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**1462-78-R; 1620-78-R** Carpenters District Council of Lake Ontario on behalf of Locals 397, 572, 1071 and 1450 of the United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Hugh Murray Limited; Hugh Murray (1974) Limited, (Respondents).**

**Abandonment – Bargaining Rights – Construction Industry – Union not pursuing bargaining rights for several years – Union abandoning bargaining rights – Provincial agreement not binding on employer**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

**APPEARANCES:** *Douglas J. Wray and Quintin Begg for Carpenters District Council of Lake Ontario; K. W. Kort and Hans Suedbeck for Hugh Murray (1974) Limited; no one appearing for Hugh Murray Limited.*

**DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER H. J. F. ADE; July 26, 1979**

1. These proceedings are hereby consolidated.
2. These proceedings concern the status of certain bargaining rights allegedly held by the United Brotherhood of Carpenters and Joiners of America, Local Union 572. This local is one of the member locals of the Carpenters District Council of Lake Ontario. For convenience purposes the term "union" will hereinafter be used to refer both to Local 572 and to the Carpenters District Council of Lake Ontario acting on behalf of Local 572.

3. It is common ground that on May 1, 1972 Hugh Murray Limited ("Hugh Murray") was one of a number of members of the Quinte Construction Association which entered into a collective agreement with the union covering carpenters and carpenters' apprentices in the Board's geographic area No. 12. During the month of May, 1974 the business of Hugh Murray was sold to Hugh Murray (1974) Limited, a company owned by Mr. Hans Suedbeck, a former employee of Hugh Murray. There is no dispute but that this sale amounted to a sale of a business within the meaning of section 55 of *The Labour Relations Act*.

4. File 1462-78-R is an application by the union for a declaration that Hugh Murray (1974) Limited is bound by the terms of a current province-wide collective agreement between an employee bargaining agency comprised of both the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America on the one hand, and an employer bargaining agency comprised of a number of contractor associations on the other hand (the "provincial agreement"). The provincial agreement is applicable to all carpenters and carpenters' apprentices employed in the industrial, commercial and institutional sector of the construction industry for whom the United Brotherhood of Carpenters and Joiners of America, or any of its locals, hold bargaining rights in the Province of Ontario. This agreement is the first such agreement to be negotiated pursuant to the amendments to *The Labour Relations Act* enacted by *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31, as well as the designation of the two bargaining agencies by the Minister of Labour on March 3, 1978.

5. Hugh Murray (1974) Limited resists the union's application on the grounds that whatever bargaining rights the union may have held with respect to its employees in Board Area No. 12, they were abandoned by the union, and hence, there are no current bargaining rights which can be affected by the provincial agreement. As an alternative position, Hugh Murray (1974) Limited relies upon its application in File No. 1520-78-R requesting that the Board terminate any bargaining rights held by the union pursuant to section 51 of the Act. Section 51 empowers the Board to terminate the bargaining rights of a union due to its failure to either give notice to bargain or to bargain for an agreement after such notice has been given.

6. As noted above, Hugh Murray and a number of other members of the Quinte Construction Association entered into a collective agreement with the union on May 1, 1972. It is not clear on the evidence whether this agreement expired on April 30, 1973 or whether it was allowed to automatically renew itself until April 30, 1974. However, it is clear that the agreement did come to an end no later than April 30, 1974. In March of 1974 negotiations for a new agreement commenced between the union and the Quinte Construction Association on behalf of its members who had signed the previous agreement.

7. During the month of May 1974 the business of Hugh Murray was sold to Hugh Murray (1974) Limited. The effect of section 55(3) of the Act was to continue the union's bargaining rights and to entitle the union to serve notice to bargain on Hugh Murray (1974) Limited. The fact of the sale of the business was not kept a secret. Indeed, a large announcement of the sale was placed in a local newspaper by Hugh Murray (1974) Limited. Mr. Quintin Begg, who since 1977 has been the business representative of the Carpenters District Council of Lake Ontario but was for some time prior to that the president of the Council, indicated that he was aware of the sale of the business at the time that it occurred. Notwith-

standing these facts, the union did not serve notice to bargain on Hugh Murray (1974) Limited. On September 27, 1974 the union entered into a new collective agreement with certain members of the Quinte Construction Association, but Hugh Murray (1974) Limited was not a signatory to the agreement. Even after this agreement was concluded the union did not serve notice to bargain on Hugh Murray (1974) Limited, and indeed, never did serve the company with notice to bargain.

8. Not only did the union not serve notice to bargain on Hugh Murray (1974) Limited, but it never contacted the company at all. Most of the company's work since 1974 has involved the erection of pre-engineered steel buildings. According to counsel for the union, the union's position is that these buildings should be erected by composite crews partially comprised of carpenters. Of the two crews employed by the company to do this type of work, one had a single employee who by training was a carpenter, but the other crew generally operated without the services of a carpenter. Notwithstanding this fact, the union never raised with the company its views concerning the use of carpenters in composite crews. The company has also engaged in the construction of buildings utilizing the traditional methods of construction. For this purpose it has hired and laid off carpenters as required. It has not, however, hired any carpenters through the union hiring hall nor has it made any welfare remittances to the union on behalf of the carpenters in its employ. At no time prior to the bringing of this section 55 application did the union indicate to the company that is claimed bargaining rights in Board Area No. 12 with respect to the carpenters in its employ. In the Fall of 1977 Mr. Begg, the business agent of the union, did visit the site of a new union hall being constructed for another trade union by Hugh Murray (1974) Limited. During the visit Mr. Begg talked to a carpenter in the employ of the company who happened to be a union member. Mr. Begg did not, however, talk to any representative of the company or claim that the union had bargaining rights with respect to the individual concerned.

9. When all of the evidence is considered we are satisfied that although the Act continued the union's bargaining rights and allowed it to serve notice to bargain on Hugh Murray (1974) Limited, for reasons of its own the union chose not to do so, but rather at all times acted as though it did not have bargaining rights for the company's employees. On these facts we can only conclude that the union voluntarily abandoned, or gave up, its bargaining rights, and that it did so prior to the designation of the employee and employer bargaining agencies by the Minister of Labour in March of 1978.

10. At the hearing counsel for the union contended that the Board had no jurisdiction to conclude that the union had lost its bargaining rights through abandonment. With this we are unable to agree. Although unions generally obtain and lose bargaining rights through the certification and termination procedures set forth in the Act, the Board has long recognized that bargaining rights may also be acquired through the voluntary recognition of a union by an employer, and lost through the voluntary abandonment of those rights by a trade union. Apparently the first case where the Board concluded that a union had abandoned its bargaining rights was *Guelph Cartage Co.* 55 CLLC ¶18,018. In that case a union which had been certified in August 1948 did not serve a notice to bargain on the employer until July of 1955. When the matter came before the Board, the Board ruled that since the union had "slept on its rights" for seven years it could not now call upon the employer to enter into negotiations. A summary of the type of situations where the Board has applied the principle of abandonment since that first case is set out as follows in the *J. S. Mechanical* case, [1979] OLRB Rep. Feb. 110:



“Over the last 20 years the principle of abandonment has been deeply entrenched in the Board’s jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC ¶ 18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N. W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union’s abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

11. Having regard to the above, we are satisfied, and hereby declare, that neither the United Brotherhood of Carpenters and Joiners of America, Local Union 572, nor Carpenters District Council of Lake Ontario on behalf of Locals 397, 572, 1071 and 1450 of the United Brotherhood of Carpenters and Joiners of America, holds bargaining rights with respect to carpenters and carpenters’ apprentices in the employ of Hugh Murray (1974) Limited in Board Area No. 12. Accordingly, the application under section 55 of the Act in File No. 1462-78-R is hereby dismissed. For the same reason the application to terminate bargaining rights in File No. 1620-78-R is likewise dismissed.

## DECISION OF BOARD MEMBER C. A. BALLENTINE:

1. I have read the reasons proposed by the majority of the Board and I must, with respect, dissent from their conclusions reached in the instant case. In my view, the decision of the majority turned on one issue and one issue alone, that is, where the applicant union holds the bargaining rights for the employees of the respondent in Board Area No. 12.

2. The issue as to the sale of a business was resolved by the Board in a decision dated September 19, 1978 (Hugh Murray Limited), Board File No. 0387-78-R, unreported, and see in particular paragraphs 7, 8 and 9). This decision of the Board applied to Board Area No. 29 in the same way as the instant case applies to Board Area No. 12. In the earlier Board decision, the Board recognized in paragraph 8 that there was a sale of a business of Hugh Murray Limited as a going concern and in paragraph 7 of that decision placed very little concern on the "Armco" pre-engineered structures.

3. *The same considerations apply in the present case.* The applicant was obviously only aware of two general contracting projects in Board Area No. 12 prior to making the instant application. Mr. Quintin Begg testified that since being business agent of the union in 1977, he was aware of only two projects being constructed by Hugh Murray. With respect to one project, that is the Union Hall at Batawa, he stated: "I visited the job in the fall of 1977 and was advised it was being built by union men. I discovered one carpenter's union member on a job and there was no problem. Everything seemed to be in order." The other project was a school on Avonlow Road in Belleville. With respect to that project, he stated: "I became aware of this project in the fall of 1978 when a union member, who had worked for Hugh Murray before, was refused employment. I checked the union file and believed a collective agreement existed, the union had had no previous complaints in regard to the Company. I went to a lawyer's office and the application was filed with the Board on November 27th, 1978."

4. Considering the foregoing, I cannot agree with the majority when it stated in paragraph 9: "On these facts we can only conclude that the union voluntarily abandoned, or gave up, its bargaining rights."

5. Even setting aside the above viewpoint, I must take a position of agreeing with counsel for the union when at the hearing he contended that the Board did not have jurisdiction to find that the union had lost its bargaining rights through abandonment. In my view, an analysis of the relevant authorities suggests that in fact the Board is exceeding its jurisdiction by finding that a trade union has abandoned bargaining rights.

6. In *Re Shopmen's Local Union No. 734 and Brayshaws Steel Ltd., et al*, [1972] 2 O.R. 549, the Court of Appeal for Ontario quashed a decision of the Board wherein the Board purported to set aside a collective agreement which had been executed contrary to the Board's policy against signing a collective agreement in the "shadow of another union's organizing campaign". Jessup, J. A. held at pp. 555-556:

"The question therefore is whether the Board had the power to make the vitiating declaration that it did. No such express power is asserted but it is said that such a power is to be, implied from the words in s. 5(1) of the statute, 'are not bound by a collective agreement'. These

words are said to empower the Board not only to find whether there is in existence a collective agreement within the meaning of s. 1(1)(c) and to find the employees affected by it but also to find, on the application of such equitable principles as the Board may think proper, whether the agreement is operative for any purposes. Clearly the Board has no inherent jurisdiction. Since its powers are statutory they must be found in clear language of necessary intention. In my opinion the only powers conferred on the Board by s. 5(1) are to ascertain whether a collective agreement within the meaning of s. 5(1) exists and to determine the persons such agreement affects; the words 'bound by' in s. 5(1) simply express the legal result of s. 37 of the statute. That section binds the Board as well as the parties to a collective agreement. In my view the quoted words from s. 5(1) could read, in the same sense, 'are not included in (or affected by) a collective agreement'. Where the Legislature has deemed it expedient for the Board to have power to render a collective agreement inoperative, it has granted the power to express words as in s. 45a(4) [enacted 1964, c. 53, s. 5; rep. & sub. 1970, c. 85, s. 20(2) (now s. 52(4))], an express grant of power which would be redundant, if the Board has the equitable jurisdiction contended for. It is also significant that ss. 39, 42, 43 and 44 [now ss. 44, 48, 49 and 50] also expressly provide that, upon certain findings by the Board, collective agreements cease to operate."

and at p. 558:

"I cannot leave this case without two comments. Firstly, I note the painstaking care, fairness and intellectual honesty of the Board in the protracted proceedings before it and as evidenced by the reasons for its decisions. Secondly, it is said the effective jurisdiction contended for is essential to the effective functioning of the Board not only in circumstances such as the present but so as to enable it to frustrate, for instance, a 'sweetheart contract'; it will be a matter for the wisdom of the Legislature whether there should be the grant of such a power."

More recently, in *Re Libby, McNeill and Libby of Canada Ltd., and United Automobile, Aerospace and Agricultural Implement Workers of America, et al.*, (1978) 21 O.R. (2d) 340, (appeal allowed by the Court of Appeal on procedural grounds, (1978) 21 O.R. (2d) 362), the Divisional Court, in quashing the decision of the Board wherein the Board had purported to void a collective agreement without any statutory authority therefore, relied upon *Brayshaws*, supra. The Court held, at p. 346, as follows: "It follows that no exclusive jurisdiction to determine the non-operation or avoidance of a collective agreement is granted to the Board other than for causes set forth in the enumerated sections: e.g., non-entitlement, replacement by another union, decertification, fraud." At p. 358:

"I am unable to find any difference in principle between the problem in the *Brayshaws* case and the one under judicial review here. The power of the Labour Board to declare an agreement to have been terminated or inoperative has been dealt with specifically in the following sections: ss. 40, 41(1), 42, 44(1) and (3), 49(6), 50, 52(4), 55(6)(a) and (b), and



118(6)(a). Nowhere in the statute is there found power given specifically to the Board to declare that a collective bargaining agreement valid and in force, is rendered null and void by reason of the ruling made under the anti-inflation legislation. Section 95 does not aid the Board in this respect. That section does not confer jurisdiction upon the Board but merely characterises the jurisdiction and power which the statute otherwise confers. The Board's exclusive jurisdiction is only related to *powers conferred upon it by or under this Act* ... In my view, however, the particular problem with which we are concerned here was one that should be dealt with simply on the grounds that the Board had no jurisdiction to embark upon this consideration. *This Board does not have residual, general, equitable or inherent jurisdiction and must operate within those specific powers given to it under its creating statute.*" [emphasis added]

This decision was recently followed by Holland, J. in *Edmonds v. Perth County Board of Education*, (1978) 21 O.R. (2d) 510 (H.C.). The Board has specifically adopted the reasoning in *Brayshaws* and, in two decisions, has refused to apply the policy as to abandonment of bargaining rights in factual situations similar to the present case. In *The Frid Construction Company Limited* case, [1975] OLRB Rep. March 146 at pp. 150 and 152, the Board upheld the union's bargaining rights on the sole basis of a certificate granted some 20 years earlier. A similar result was reached in *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568 at pp. 571-572. In *Vitaform Products Canada Limited* and *Pre Fab Cushioning Products Limited*, OLRB File Nos. 1589-75-R and 1581-75-R, unreported decision dated March 2, 1976, para. 4 thereof, the Board upheld a trade union's bargaining rights on the basis of a certificate issued approximately 6 years earlier where no collective agreement had ever been reached between the parties. In this regard, I also refer to *Napev Construction Limited, et al*, unreported, OLRB File No. 1112-77-M decision dated December 28, 1977, where, at para. 13, the Board reiterated that: "... bargaining rights may only be terminated in accordance with the provisions of The Labour Relations Act ...". Moreover, the Board has recognized that it has no inherent or equitable jurisdiction to discharge under the Act but rather, being a creature of the statute, may only exercise the powers therein contained. In this regard see *Christie, Brown & Company Limited, et al*, [1975] OLRB Rep. June 524, where, at p. 527, the Board relied upon *Brayshaws* and stated: "The Board has learnt through experience that it lacks jurisdiction to impose and remove bars to applications for certification unless expressly instructed by their interpretation of the legislation. Otherwise what may appear to be 'equitable' to one party will surely be viewed as 'arbitrary' by the opposite party." And see, generally: *R. v. Ontario Labour Relations Board, Ex Parte Metropolitan Life Insurance Co.* [1970] S.C.R. 425 and the decision of the Court of Appeal for Ontario in *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498.

7. The applicant obtained its bargaining rights May 1, 1972. Hugh Murray Limited was one of a number of member of the Quinte Construction Association which entered into a collective agreement with the union covering carpenters and carpenters' apprentices in the Board's geographic area No. 12. At no time has the Board entertained an application to terminate these bargaining rights with the exception of the present application, Board File No. 1620-78-R which was filed with the Board on December 28, 1978, one full month after the union filed application No. 1462-78-R.

8. Reiterating my position at the outset, this case turns specifically on the issue of bargaining rights, and if my conclusion that the Board does not have the jurisdiction to find abandonment of bargaining rights is correct then it follows that the termination application (File No. 1620-78-R) is not timely. Furthermore, if my conclusion is correct the respondent in this case would plug into the provincial agreement by virtue of the provisions of section 132(4) of the Act.

9. It is my decision that the respondent Hugh Murray (1974) Limited is bound by the provincial collective agreement between the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners and the Labour Relations Bureau of the Ontario General Contractors Association for the Board's geographic area No. 12.

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**0336-79-U Lake Ontario Steel Company Limited,(Complainant), v. United Steelworkers of America, Local 6571, (Respondent).**

**Collective Agreement – Duty to Bargain in Good Faith – Memorandum of agreement ratified but not signed by trade union – Whether collective agreement existing – Whether failure to sign bargaining in bad faith.**

**BEFORE:**Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:***C. E. Humphrey and T. Howells for the complainant; L. Ingle, Q.C., G. Wareham and M. Tobin for the respondent.*

**DECISION OF THE BOARD;**July 4, 1979

1. This is an application under section 14 of *The Labour Relations Act* in which the complainant requests the Board to direct the respondent to sign a draft collective agreement presented to it by the complainant.

2. The proposed collective agreement embodied terms and conditions set out in a document referred to as a Memorandum of Settlement. This Memorandum had been ratified by the members of the respondent. It was, however, never signed by either the complainant or the respondent. Following ratification of the Memorandum, the membership which had been on a legal strike returned to work.

3. Upon being advised that the Memorandum had been ratified, the company prepared and presented to the union the draft collective agreement. The union declined to sign the draft collective agreement and the company brought this complaint.

4. Having regard to all of the evidence and notwithstanding the fact that the Memorandum of Settlement was ratified, the Board finds that there was a lack of understanding between the parties with respect to the scope of certain improvements to the dental plan and that the parties, although acting in good faith, were never of one mind as to the intent car-

ried by the wording of the Memorandum and proposed collective agreement dealing with the addition of Blue Cross Riders 3 and 4 to the Dental Care Plan, so that there never was an agreement actually reached in that area.

5. That being the case, the Board finds that there has been no violation of section 14.
6. The complaint is accordingly dismissed.

**1463-78-R** Laurentian University Faculty Association,(Applicant), v. Laurentian University of Sudbury,(Respondent), v. Group of Employees, (Objectors).

**Certification – Employee – Practice and Procedure – Representation Vote – Ballots in English – Employees requesting ballots in French after vote counted – Whether Director employee – Not exercising managerial function.**

**BEFORE:**Arthur Haladner, Vice-Chairman and Board Members J.D. Bell and W. F. Rutherford.

**APPEARANCES:***C. M. Mitchell, T. Bartley and R. Kari for the applicant; K. R. Valin for the respondent; Jean Eugene Havel for the objectors.*

**DECISION OF THE BOARD;** July 9, 1979.

1. On November 27, 1978 the applicant, Laurentian University Faculty Association, applied for certification for a unit of employees of Laurentian University. This hearing was called for the purpose of considering an objection to the conduct of the representation vote taken on April 4, 1979 and for the purpose of hearing representations from the parties on the issue of whether certain persons classified as "director" should be included or excluded from the bargaining unit.

2. At the hearing the Board indicated that while it regretted the fact that the ballots in this matter had not been printed in both French and English, it was not, in the circumstances, prepared to direct a new vote having regard to the delay and prejudice both to the applicant and to the future course of representation proceedings that such a direction would create. In so ruling, the Board pointed out that the desire for a French and English ballot had not been communicated until after the vote had been conducted and the results known. This, despite there having been, prior to the vote, ample opportunity to express that desire. The Board also expressed its opinion that the absence of a French and English ballot did not affect the outcome of the representation vote. In that vote the employees voted 107 to 81 in favour of the applicant.

3. Dealing now with the issue of Director status – the report of the Labour Relations Officer indicates that for the most part recommendations for hiring are made by the school's



academic council or by the faculty as a group, and submitted to authorities superior to the director where the decision is made. Apart from Dean Hilldrup, who made one decision and one effective recommendation – after conducting interviews in South Africa when the senate appointments and promotions committee was not available – the involvement of directors in the hiring process is minimal.

4. Directors' role in evaluation of faculty members is primarily one of co-ordination, i.e., calling for recommendations from other faculty members, the school council or the appointments and promotions committee, and submitting them to higher authorities.

5. Directors submit recommendations on promotions and tenure; however, there was no evidence that their recommendations, if contrary, outweigh those of the faculty as a group. Moreover, these recommendations are for the most part made with the participation of faculty members.

6. Directors' recommendations on salary are limited to whether an increase should be granted. They have no discretion to recommend specific amounts.

7. Directors' role in discipline of faculty members is minimal, being limited to the occasional reprimand – in one of the two examples given after consultation with faculty and the Dean. Directors have no authority to discharge or suspend.

8. One director made a sabbatical recommendation which, as far as she knew, was accepted. However, the others had no independent involvement with the process, although one thought he could make a negative recommendation.

9. Directors' role in budget formulation is primarily consultative; in preparing budget recommendations, they consult with the school budget committee or their colleagues, and decisions are made at the Senate level. Directors have no authority to re-allocate funds having to do with salaries.

10. Directors assign work to the secretaries on the support staff and evaluate their performance. However, the time spent in the performance of these functions is minimal, and other faculty members are involved.

11. In *Carleton University*, [1975] OLRB Rep. June 500, the Board pointed out that there are significant differences between the university model, where decision-making is shared by a peer group, and the industrial model of hierarchic authority, where ultimate power resides above – typically, with the plant manager – and filters down through a management chain to the primary level of supervision – the unit supervisor, or foreman. It stated:

“While the Board of Governors is, in a general overall sense, responsible for the business operations of the institution, and the senate for its academic policies, the power of detailed decision-making is diffuse and extends into the institution's basic organizational unit, the department. Moreover, management-type decisions are made not only by the Board of Governors, the senate, the president, the senior administrative staff, the deans, but by faculty members as well and in more recent times,

students, as members of various committees or boards ... Important determinations of general application are made at the higher levels and in this sense, a parallel with the industrial model remains. What is novel is that many important decisions, narrower in scope and having to do with the academic and personnel matters applicable to limited groupings, do originate at the department level, subject only to endorsement at the higher levels."

12. In determining that department chairmen were employees for purposes of the Act and included in the bargaining unit, the Board in *Carleton* concluded:

"In those areas of greatest importance – hiring, tenure, promotion, dismissal – the dominant role is played by the department collectively ... In the more routine areas, while some potential for the exercise of independent discretion exists, it is for the most part narrowly circumscribed. Moreover, in a substantive sense, the decisions in these areas are of limited importance ... In our view, the infrequent exercise of authority over the office staff poses no danger of conflict of interest within the unit. It is important to emphasize that the overwhelming proportion of the chairman's duties have nothing whatever to do with the supervision or control of the department's small clerical staff ..."

See also *University of Windsor*, [1977] OLRB Rep. May, 300, where the Board, following *Carleton*, determined that department heads did not exercise managerial functions for purposes of section 1(3)b) of the Act and were, therefore, appropriate members of the academic bargaining unit.

13. The Board is of the opinion that the Directors, whose status is in dispute, play a similar role in the decision-making process at Laurentian to that performed by department chairmen in Carleton and department heads in Windsor. While there are some differences in certain isolated areas, the Board is satisfied that their duties and responsibilities are not in any fundamental respect different. The evidence is that they play a part in a process of shared decision-making and do not, in the areas of greatest importance, i.e., hiring, tenure, promotion, and dismissal, play a dominant role which would entail the risk of a conflict of interest. Our conclusion, after considering the evidence, is that the Directors of the School of Engineering, Translators and Int., Nursing, Social Work, Education and Physical Education do not exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and, accordingly, that they are included in the bargaining unit. The Director of the School of Graduate Studies and Director, Conseil de l'enseignement en français are excluded from the bargaining unit by agreement of the parties.

14. Having regard to the foregoing, the Board finds that all full-time members of faculty including full-time professional librarians employed by Laurentian University of Sudbury at Sudbury, Ontario, to whom at least fifty per cent of the salary at the University is paid by the University, save and except President, Vice-President Academic, Special Assistant to the President, Deans, Director of the School of Graduate Studies, Directeur du Conseil De l'enseignement en français, Chief Librarian, part-time members of faculty, technicians, faculty members employed by Laurentian University for a period of not more than one year while on leave from another university or other employer and members of the

Board of Governors, constitute a unit of employees of the respondent appropriate for collective bargaining.

#### Clarity Notes

- (1) The designation "all full-time faculty including full-time professional librarians employed by Laurentian University of Sudbury at Sudbury" is deemed to include those aforementioned employees on the payroll of Laurentian University who from time to time may be requested to teach at various locations outside the City of Sudbury.
- (2) "All full-time faculty (professional librarians)" shall mean such persons holding an academic rank at present described as instructor, lecturer, assistant professor, associate professor or full professor (general librarian, assistant librarian, associate librarian or full librarian) and whose duties and responsibilities are fifty per cent or more of the full status employees in the same classification in the same academic unit.

15. A certificate will issue to the applicant.

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### **1483-78-U Jorge Menacho,(Complainant), v. Local 247 of the Laborers' International Union of North America, (Respondent).**

**Duty of Fair Representation – Collective agreement providing hiring hall procedure – Actions complained of not occurring during currency of collective agreement – Whether violation of section 60a – Whether onus on respondent union to disprove allegations.**

**BEFORE:**Rory F. Egan, Alternate Chairman.

**APPEARANCES:***Thomas W. Troughton and Jorge Menacho for the complainant: A. M. Minsky, B. Fishbein, Michael Sullivan and Izodoro Rafeiro for the respondent.*

**DECISION OF THE BOARD;** July 3, 1979.

1. The complainant alleges that he has been dealt with by the respondent contrary to the provisions of section 60a of *The Labour Relations Act*.

2. Section 60a provides:

"Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith."



3. The complainant requests the Board to issue an order directing the respondent to cease doing the acts complained of and to rectify it. The complainant seeks an order for costs and loss of earnings and other employment benefits.

4. The respondent raised a preliminary point in submitting that in order for the applicant to prove an offence under section 60*a* he must first establish that the trade union concerned is engaged in the selection, referral, assignment, designation or scheduling mentioned in the section "pursuant to a collective agreement". The submission is that no collective agreement was in effect either factually or under the Act by virtue of the operation of sections 132(2) and (3) which provide:

"(2) Notwithstanding subsection 1 of section 44, every collective agreement in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 and represented by affiliated bargaining agents entered into after the 1st day of January, 1977 and before the 30th day of April, 1978 shall be deemed to expire not later than the 30th day of April, 1978, regardless of any provision respecting its term of operation or its renewal.

(3) Where any collective agreement mentioned in subsection 1 ceases to operate, the affiliated bargaining agent, the employer and the employees for whom the affiliated bargaining agent holds bargaining rights shall be bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and the employer bargaining agency representing the employer."

5. The provincial agreement applicable to the present situation was not ratified by the employee agency until December 7, 1978. The employer Council ratified it on December 4, 1978.

6. The respondent's position based upon the foregoing was that from May 1, 1978 until December 14, 1978 there was no collective agreement in the industrial, commercial and institutional sector binding upon the respondent union and that, consequently, no offence could be found between May 1, 1978 and December 14, 1978. The respondent further argued that on May 31, 1978 a "No Board" report was issued by the Minister so that even if section 70 were to be held applicable notwithstanding section 132, any conditions under the agreement would have ceased to operate on June 15, 1978. It was argued that at the most, the Board could only entertain complaints of events occurring during the actual currency of an agreement under the Act.

7. The complainant argued that "pursuant to a collective agreement" did not require the actuality of a collective agreement at the time the alleged offence took place but, rather, that it was sufficient to show that there had been a collective agreement under which the practices had originated at the time when the selection, referral, etc. engaged in by the trade union commenced or was established. The complainant alleged that in any event there had been a collective agreement in effect at the time the offence arose and its cessation could not have the effect of disposing of the complaint. As to evidence with respect to events occurring after the expiry of the collective agreement, the applicant argued that it should be admissible as similar fact evidence going to motive.

8. A reason for the reference to a collective agreement in section 60a of the Act is because the terms of a collective agreement with respect to hiring through the union concerned may contain conditions governing the selection, referral, assignment, designation or scheduling of persons to employment. The application of section 60a is thus not universal and does not confer upon the Board the general jurisdiction to inquire into the internal arrangements or administration of the union with respect to its hiring hall practices, except where these may be conditioned by the terms of the collective agreement between it and the employer concerned.

9. The Board finds that effect must be given to the words "pursuant to a collective agreement" as meaning a collective agreement current at the time the incidents occurred. That being the case, it is incumbent upon the applicant under section 60a to prove the existence of a collective agreement applicable to the situation and containing provisions governing the selection, referral, assignment, designation or scheduling of persons to employment in order to sustain allegations of a breach of section 60a.

10. The foregoing motions were not ruled upon by the Board at the hearing. The Board proceeded to hear the case upon the merits while reserving its decision upon the above preliminary points.

11. The evidence is that the respondent union is in the construction field. It operates out of Kingston and covers Board areas 12, 29 and 30. These areas run from Brighton in the west to Cardinal in the east, a lineal distance of 150 miles more or less. Included in the areas are the Municipalities of Trenton, Belleville, Kingston, Brockville and others.

12. It is significant that the local union ranks include skilled, semi-skilled and unskilled persons. Among these are miners, drillers, pile drivers, cement finishers and ordinary labourers.

13. Local 247 operates a hiring hall through which it refers its members to employers who seek workers. This is not only done pursuant to a collective agreement. The basic principle is that the Local maintains a list of its members who are unemployed and from which it selects persons for dispatch to jobs when an employer requests help. Generally speaking, the person who has been longest on the list is given the first opportunity to fill the vacancy. If he is not available or cannot be reached, the next person on the list is called and so on until someone fills the vacancy. This procedure is dictated by the nature of the industry where the request from the employer requires immediate response. It is the responsibility of the individual members to see that their names are entered on the list as soon as they cease to be employed. The position on the out-of-work list is determined by the date upon which the member reports to the office and not by the date upon which he was laid off. Thus, two people who had been laid off on the same day may have different positions on the out-of-work lists depending upon when they registered with the union. This is a point which is of particular relevance in the present situation.

14. Menacho complained that the two sons of Mr. Sullivan, the President of the Local, had been laid off at the same time as he had been but had been referred to work before he was. The evidence, however, established that the Sullivans had gone to the union office and registered days before Menacho did. The result was that they were ahead of him on the list and thus were referred to work before he was.

15. A further variation of the general approach which is significant in these proceedings occurs where the call from the employer is for a person or persons who are skilled in one trade or another. In that case, if the person or persons at the head of the list does not possess the required skills, the order of registration has to be bypassed until a skilled person is found. The first person on the list possessing the skill and who is available is then given a referral slip. This practice is clearly understood by the membership as being necessary and proper since it would obviously be unreasonable to send out an unqualified person on a skilled job or one requiring special training. The application of this policy gave rise to one of the complaints of the grievor of having been laid off from a job being done by Kilmer Von Nostrand near Millhaven about February 2, 1978.

16. The complainant observed that a number of other members of the Local who had been laid off at the same time as he had been were sent back to the job but he was not. His position was that this was a discriminatory action against him.

17. The evidence adduced through the project superintendent at the Millhaven site of Kilmer Van Nostrand established that the persons recalled were specified by the company because they were people whom the company had trained to do specific skilled jobs. The witness identified a handwritten list of names as being one prepared by him listing the skilled persons he required. The complainant's name was not on the list. The union complied with the company's request and sent the trained persons to the job site.

18. Mr. Menacho challenged Izodoro Rafeiro, Secretary-Treasurer, about the above matter. Rafeiro told him that the men had been sent as the result of a letter that the union had from Kilmer Van Nostrand. He refused to let Menacho see the letter. The fact is that there was not actually a letter in the formal sense but simply the written list prepared by the project superintendent. It would have been better for all concerned if Rafeiro had taken the trouble to explain more fully to Menacho the reason why the men were sent back to the job. The explanation given at the hearing is a valid one but the incident, I am sure, forms part of the complaint only because of a lack of proper communication with Menacho.

19. There is yet a further deviation from the general practice that is applicable in the present situation because of the geographic areas that are covered by the Local. The practice has always been that when a job becomes available in Kingston or Brockville or Prescott, the person on the out-of-work list who resides in the location of the job is given preference according to his place among the out-of-work members in that particular district. That is an understood and regular procedure.

20. Again, it has always been the policy that where a member has been out of work for a considerable time, he is not moved from the top of the list simply on the basis of two or three days of work. This may mean that he may get two or three referrals to jobs without moving to the bottom of the list while those below him are given no referrals. A lack of understanding of this practice could quite easily lead to a suspicion of discrimination or favouritism.

21. Members who are sent to jobs through the union office are given referral slips. These forms introduce the name of the member to the prospective employer. They indicate the type of job and indicate to the member the employer concerned and, in some instances, the name of the particular person to whom the member is to report. Duplicates of these re-



ferral slips are kept in the offices of the union. The date of issue is recorded on the original and duplicate. Counsel for the grievor obtained and had analyzed the duplicate referrals covering the years 1976 to 1978 with a view to demonstrating that the grievor had not been dealt with fairly and had not received the same number of referrals as others during those years. The difficulty of attempting to analyze and draw conclusions from these books became apparent when the customary practices described above are taken into account. The result is that the number of referrals received by an individual in the course of a year is governed by a number of factors and, as already indicated, no general conclusion of discrimination can be drawn from a perusal of the referral books alone.

22. The form of record to which reference has already been made is the out-of-work list upon which there is recorded the names of the unemployed members in order of dates upon which they reported to the office that they were looking for employment.

23. There was a difference of opinion as to the length of time that these sheets were required to be kept. There were none available covering the whole period of the complaints and their absence added difficulty to the examination of the practices with respect to them. It was urged most strongly on behalf of the grievor that the method used by the union in disposing of these lists and in preparing their updating was such as to frustrate any attempts a member might make to check upon their accuracy and that this, in itself, was a matter indicative of arbitrary conduct on the part of the union. It may well be that a better method of recording the out-of-work members and the referrals might be devised which would provide a clear and current record of the situation to the members and which would thus avoid the problem Menacho seems to have encountered with the lists. It does not follow, however, that the methods used for a number of years by the union and accepted by the membership are arbitrary, discriminatory or in bad faith. There certainly was no evidence of general membership dissatisfaction with the records or with the conduct of the hiring practices in general. That fact, of course, does not rule out the possibility of discrimination against an individual but does render it less likely.

24. It should also be observed that members of the Local are free to go about hunting jobs on their own and are not required to rely solely upon the union to refer them to jobs.

25. Incidentally, there was filed at the hearing a document prepared by the Unemployment Insurance Commission called "Certification of Union Status". This document is for the purpose of certifying that the person named therein is "a member in good standing of this union and had registered with us as unemployed". The date is provided for and the document is to be signed by the local union.

26. The document contains an "Instruction to Members" which reads:

This notice must be remitted to the Unemployment Insurance Commission with your Application for Benefits. If you fail to remit this notice to the Unemployment Insurance Commission, your membership with the Union will not be confirmed and as a consequence you may be held responsible for your own work search, which may result in a delay in benefit.

27. The evidence is, for what it is worth, that the out-of-work lists are checked by the

Unemployment Insurance Commission from time to time presumably to ensure that work opportunities are being afforded to the members according to the lists.

28. Mr. Menacho testified also that in July 1978 he was sent to a job at Maitland. This job was in the no-mileage zone of Brockville. Menacho got the referral slip through Manuel Valente who, in turn, had obtained it from Rafeiro who testified that he had been unable to reach Menacho. He said he had called several time but had not been able to contact him. When Rafeiro discovered that Valente knew where Menacho was, he gave him the referral slip for Menacho.

29. After he had been on the Maitland job for a while, he discovered that some members of the union had left and gone to a higher-paying job in Brockville. His complaint was not entirely personal since he alleged that these people had been moved to a higher-paying job while others were out of work. The evidence is that these people had been working at the jobs in Brockville until they were closed down by a strike by the Carpenters. Once the strike was over, they simply returned to the former jobs as they were entitled to do. The matter is, consequently, not relevant to the charge under section 60.

30. The evidence established that during the years 1976, 1977 and 1978, there was very little employment in the whole of the area covered by the respondent Local and that up to 50% of its membership had been on the lists at one time. Mr. Menacho complained that he had had only 34 weeks of work during a period commencing in August of 1976 to the date of the complaint and that these had been accumulated through two jobs. The evidence, however, established that this allegation was incorrect. Mr. Menacho had had four jobs in the period in question and had had somewhere closer to 54 weeks of work. It is difficult to understand how inadvertence could explain an omission of that kind in the context of his allegations against the respondent involving lack of work. The omission, of course, if it had not been discovered in cross-examination, might have weighed seriously against the respondent. It certainly affects the weight to be given to the complainant's other evidence.

31. It was urged by counsel for the complainant that having in mind the fact that the documents relating to the hiring hall practices are under the control of the union and that the dispatch of persons to employment may be subject to knowledge immediately available only to the union office, the Board ought to impose upon the union concerned in a section 60a case and, in particular, in the present case, an onus similar to that placed upon an employer by section 79(4a) of the Act. That section provides:

“On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.”

32. It goes without saying that if the Legislature had intended that such an onus be applied in section 60a situations, it would have said so, particularly when both sections came into effect at the same time. In the absence of the onus referred to, the Board remains governed by the ordinary rules with respect to onus. The complainant under section 60a must therefore establish a case upon the balance of probabilities.

33. On that basis the Board finds, even if it were to be assumed that all the evidence is admissible, that the complainant has not established that he was dealt with by the respondent contrary to the provisions of section 60*a* of the Act. It may well be, as counsel for the grievor indicated, that improvements might be made in the procedures of the respondent which might keep the membership better informed. That, however, is a matter for the membership. The Board's concern is to see that the conduct of the union under whatever procedures may have been adopted and sanctioned by the membership and the union are used in a manner that is not arbitrary, discriminatory or in bad faith. As we have already found, the procedures in the present case were applied universally and were not used in the manner prohibited by the section.

34. The complaint is accordingly dismissed.



**02040-79-R** Hotel & Restaurant Employees & Bartenders Union Local 604, A.F.L.-C.I.O.-C.L.C., Peterborough, Ont. of the Hotel & Restaurant Employees & Bartenders International Union, (Applicant), v. **Marathon Investments Limited**, (Respondent).

**Sale of a Business – Landlord occupying premises of defaulting tenant – tenant’s liquor licence revoked – whether landlord bound by tenant’s collective agreement.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *Harry Lavoie, Florence Fortune and Charlie Ireton for the applicant; P. M. Rusak and Lawrence Deakins for the respondent.*

**DECISION OF THE BOARD; July 4, 1979**

1. The name “York Hotel” appearing in the style of cause of this application as the name of the respondent is amended to read: “Marathon Investments Limited”.
2. This is an application under section 55 of *The Labour Relations Act*.
3. On March 29, 1978 the respondent purchased certain rail property which was then subject to a registered lease in favour of Benson Hotel Limited and which lease was operative to 1990. Benson Hotel Limited was in occupation of part of the property which it operated as a hotel, and Benson subleased other parts of the property to three separate lessees, all of which subleases are recognized by the respondent.
4. Subsequent to purchase by the respondent, it received, on June 9, 1978, a list of defects of the premises outlining that the premises failed to comply with the existing minimum standard bylaws of the City of Lindsay in some 88 separate particulars. The respondent held discussions with Mr. Marjan Virt, President of Benson Hotel Limited, about the list of defects and Virt took the position that he was unable financially to effect repairs. Consequently, on June 14, 1978 the respondent served Notice of Breach of Covenant on Benson, and then undertook some of the more critical defect repairs to preclude the closing of the total property, and at the date of this hearing such rehabilitative work continues to proceed.
5. Legal action taken by the respondent against Benson resulted in issuance of two Court orders being entered on August 2, 1978 forfeiting the tenancy of Benson and giving possession to the respondent for non-payment of rent by Benson.
6. Mr. Lawrence Deakins, Secretary-Treasurer of the respondent testified that the Court proceedings against Benson were undefended and Virt, President of Benson, did not physically appear at the hearing. Deakins also testified that the day previous to the Court hearing, Benson discharged all its employees and, further that the whereabouts of Virt continues to remain unknown to the respondent. At the time of the discharge of employees there existed between the applicant and Benson a collective agreement which is stated to be operative from August 15, 1977 to August 14, 1979.

7. Following the Court orders, the respondent closed up the premises except for those parts operated by former sub-lessees of Benson. The following day the Liquor Licence Board of Ontario removed the lounge licence which had been issued to Benson. It is noted that the LLBO had previously suspended a licence to Benson to operate another room on a lower level, and that in both cases the suspensions were related to the unsatisfactory physical condition of the building. Deakins testified that no personal property owned by Benson was acquired by the respondent but there remains on the premises and unused by the respondent certain items such as glasses, tables and chairs, liquor stock. The tables and chairs, some of which had been removed by Benson prior to August 2, 1978, had been purchased by Benson under a conditional sales contract and the debt under that contract has been assigned to the respondent. The respondent assumed no responsibility for the outstanding liabilities of Benson.

8. Deakins testified that on August 15, 1978 a Notice of Proposal was issued proposing the revocation of a liquor licence issued to Benson and setting the matter down for a hearing before the LLBO on October 3, 1978. Deakins also testified that following the respondent's re-entry into possession, it had made some unsuccessful efforts to interest other persons in operating that part of the property previously operated by Benson as a hotel. Benson did not appear at the LLBO hearing but the respondent did and we were told that the respondent was then advised by the LLBO that an application by it for a licence would be favourably considered if the building was brought up to standard. The respondent did subsequently make application for a license which resulted in a further hearing in March, 1979 and granting of a temporary lounge licence and since March 20, 1979 the premises have been operated as a discotheque. The respondent is also in the process of converting the former hotel rooms into apartments, and to renovating the room on the lower level, previously operated as a tavern by Benson, with the objective of having it licensed again as a tavern.

9. The applicant, through Mrs. Fortune, Business Agent of Local 604 testified that their first knowledge of Benson's abandonment of the business was on receiving telephone calls from the discharged employees on August 2, 1978. On August 28, 1978 the applicant, by letter, notified the respondent of the existence of the collective agreement and requesting the respondent to acknowledge in writing that it would be bound by the agreement. This letter resulted in a telephone conversation between Deakins and Fortune in which Deakins stated he had been unaware of any collective agreement at the time of purchase, did not think he had to honor the contract, and that in any event the premises were closed. A further letter from Mrs. Fortune was sent to Deakins on September 29 providing the names, addresses and phone numbers of the former employees and taking the position that such persons had recall rights under the collective agreement. By this letter, the applicant also put the respondent on notice of its intention to seek a declaration of successor rights unless the respondent acknowledged its bargaining rights.

10. The respondent is now operating under the name of York Hotel. The evidence was that where Benson served mainly draught beer that York serves mostly cocktails and very little draught (not in excess of 5%). It is also stated that employees are now in standardized dress of black pants and white tops and recorded music is played. Deakins testified that there is now a total of 7 employees (4 or 5 full-time and 2 part-time) and that included in this complement are two persons who formerly worked for Benson as waitresses and who applied for work with York. Deakins points out that such persons have now been trained in

mixing cocktails. Deakins personally manages the operation. It is also established that a large cooler room, part of the building, which had been used by Benson is also used by York.

11. The first question before the Board is whether there has been a continuation of the business operated by Benson. The issue to be determined can best be summed up in the language of the Board where a similar problem was posed in the case of *Gordon's Markets* [1978] July OLRB Rep. 630. In paragraph 17 the Board said:

"No matter what the form of the transaction, in order to find that a section 55 sale has taken place, the Board must be satisfied that the result of the transaction is a continuation of the predecessor's business. Since it is the predecessor's business to which the union bargaining rights attach, the successor's business must draw its life from the predecessor's business. The subsequent existence of a business identical to that carried on by the predecessor will not result in a section 55 finding of a sale if the Board is satisfied that the second business is merely a parallel business of a similar nature rather than a continuation of the successor's business."

Benson Hotel Limited was engaged in the business of retail sale of alcohol beverages. The primary tangible assets of the business were its leasehold interest in the real property and the licence issued to it by the Liquor Licensing Board. The evidence established that the value of both these assets to the carrying on of the business were inter-related inasmuch as the license to do business rested on maintenance of minimum building standards. The evidence also establishes that Benson lost all interest in or control of both of those assets by virtue of the actions of the Court and of the Liquor License Board.

12. It appears that Virt, sometime prior to August 2, had arrived at the decision to wind-up his business and commenced the removal of some furnishings. No doubt that decision was influenced by his knowledge of the impending court proceedings and that the continuance of his license was in jeopardy. The Court order, forfeiting the lease, was in no way dispositive of the business itself but merely dealt with the leasehold interest which was a part of the totality of the business. Whatever managerial expertise may have been involved in operation of the business were not acquired by the respondent, nor were the furnishings. Most significantly, the license to operate was not transferred to the respondent and the name and trading style of the predecessor are in no way utilized by the respondent. The respondent's subsequent decision to establish a business of its own, following upon an inability to interest a third party to take over the property, was motivated by a necessary desire to make the property an income-producing one, and in so doing his interests were in no way advanced by the prior business nor was there any lingering goodwill to which he fell heir.

13. Thus what has occurred is not an acquisition of the Benson business by the respondent but the establishment of a parallel business of a similar nature on the same premises. The respondent is in business, not as a result of any vitality drawn from the predecessor business. The forfeiture of the lease and the cancellation of the liquor license, in the absence of any other facets which comprised the business being acquired by the respondent, precluded a continuation of the predecessor business flowing through to the respondent.



14. The Board therefore finds that there has not been a sale within the meaning of Section 55(1)(b), and that the bargaining rights of the applicant are not binding on the respondent.

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**0127-79-R Graduate Assistants Association, (Applicant), v. McMaster University, (Respondent).**

**Certification – Representation Vote – misleading information distributed – no opportunity to reply – new vote ordered**

**BEFORE:**E. Norris Davis, Vice-Chairman and Board Members J.D. Bell and W.F. Rutherford.

**APPEARANCES:***James Hayes and Laura Alper for the applicant; Ms. Janice A. Baker, Brian R. Gatien, Fred C. Hopkinson and Dennis Shaw for the respondent.*

**DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; July 11, 1979**

1. The applicant requests the Board to direct a new representation vote based on the allegation that, material distributed to employees by the respondent in connection with a representation vote held on May 17, 1979 was misleading and calculated to influence the outcome of the vote, and that such material was distributed at a time which, because of the onset of the Board's 72-hour silent period, deprived the applicant of an opportunity of effectively countering such material.

2. The facts are not in dispute.

3. The Board under date of May 9, 1979 directed the holding of a representation vote. The parties met with a Labour Relations Officer on May 7 and 8 and agreed to the arrangements for conduct of the vote to be held on May 17. The complained of material was contained in a letter over the signature of Mr. Dennis Shaw, Dean of Graduate Studies which was mailed to the homes of members of the voting constituency on May 9, which came to the attention of the applicant late that day. Representatives of the applicant discussed the matter with their Counsel on May 10, and Counsel contacted Counsel for the respondent by phone, informing the respondent of the applicant's concerns. Counsel for the applicant on the same day confirmed these concerns by hand-delivered letter to respondent's Counsel.

4. The respondent responded to the applicant's expressed concerns and composed a further letter to members of the voting constituency which was disseminated on May 11 by being placed in the mail boxes of students located on University premises. Friday, May 11 was the last day of the University term and departmental secretaries were instructed that the students' mail boxes were to be cleared at the end of the day. A witness for the applicant stated that he had been informed by the departmental secretary in his department that 75%

of this further letter were undelivered. It should also be noted that at 12:01 A.M., May 14, the period of no propaganda directed by the Registrar set in.

5. The applicant on May 10th composed a letter to the voters (dated May 11 and also placed in students' University mail boxes on that day) and also designed a poster to counter the respondent's original letter and which posters were put up the night of May 10 and on May 11. The posters were removed on May 12 and 13 to comply with the Registrar's direction.

6. The applicant by letter dated May 10 to the Registrar enclosed a copy of the respondent's first letter to voters in regard to which the applicant noted that it "may choose to reply" on this material in further representations to the Board.

7. The vote was held on May 17, in accordance with the previous arrangements and the ballots counted save for some 25-26 segregated ballots. On May 25 the applicant made a request that a new vote be directed.

8. The respondent's first letter to voters emphasized, by underlining, certain items and in particular drew attention to an attached copy of the Union Constitution which was stated to be on file with the Ministry of Labour. This constitution is now obsolete but had been in effect at the inception of the Union and at a time when membership in the Union related solely to the University of Toronto. There is no dispute that, in fact, this document is not the applicant's current constitution nor is there any suggestion that the respondent was aware of this fact at the time of writing its initial letter. The respondent underlined certain material in Constitution as follows:

Article 3(a) (dealing with membership),

"Membership – "Any person employed on any University..." shall be eligible for membership.

Article 6(b) (dealing with officers) "The executive may from time to time by by-law, select from among the membership persons who shall sit on the executive as members and have such authority as the executive shall by by-law direct."

and,

By-law No. 1

"Be it resolved that there shall be one representative chosen from each of Divisions I, II, III, IV and one undergraduate, all of whom shall be from the University of Toronto and who shall sit on the Executive with full voting rights."

9. The respondent in its second letter stated:

"We have learned that the copy of the Graduate Assistants Association Constitution which was recently obtained from the Ministry of Labour Library, Toronto, is not up-to-date."

and attached a copy of the current constitution without drawing specific attention to the manner in which it differed from the predecessor Constitution in respect to those items highlighted by the respondent's prior communication. The Board also notes that the current constitution is much more extensive in extent of topical coverage.

10. The applicant does not argue a breach of the Registrar's direction relating to the silent period but, that the circulation of material by the respondent at a time when the respondent knew it was unlikely that the other party could make a reply places a special responsibility on the respondent to ensure that such information is not false or misleading. The applicant admits that the respondent in its letter was putting forward information which it identified as having secured from the Ministry of Labour files and which was factually correct, but that, nonetheless, in the context in which that information was presented recipients of such information would inevitably regard it as a representation of facts currently existing. The applicant further argues that this material is misleading in respect to the fundamental structure of the bargaining agent on which employees voted and to the rights which they would enjoy as members of the applicant, and particularly as to the extent of participation which they would have in respect to their future destiny as members of the applicant.

10. The respondent argues that the applicant has not moved on a timely basis and that by not objecting to, and participating in, the counting of ballots and only subsequent to that taking objection, had clearly lay in ambush seeking two bites at the cherry. The respondent further argues that it made no misleading representation in the complained of communication and that in respect to the out-dated constitution, the respondent should not be fixed with liability because the filings were out-of-date. Further, the respondent argues that even if the Board were to find a misleading representation, the question to be decided is whether it is sufficiently significant that the employees were deprived of an opportunity to freely and effectively express their wishes.

11. The Board, in general, does not consider that it should monitor campaigns preceding a representation election which are designed to persuade members of the voting constituency to exercise their franchise one way or another. It is fundamental to our society that proponents of varying views will each put forward the most persuasive arguments in favor of their position and that the electorate is competent to evaluate and decide. Despite its general position, the Board does not close its eyes entirely to the conduct of the campaign if, in its judgment the campaign has been so waged by one party to preclude the other party from a meaningful opportunity of reply and thus to impair the employees' freedom of choice and thereby call into question the weight to be accorded to the results. It is not every unanswerable claim which will cause the Board to intervene. However, in those instances in which a claim is made, which is in fact false and which relates to a significant factor which would be involved in the voter's final evaluation of the issue on which he is voting, and which the other party has not had adequate opportunity to dispute, the Board will act by ordering a new representation vote. See *Joseph Gould and Sons Limited* 52 CLLC ¶17,039.

12. In the case before us we have no hesitancy in finding that the respondent's highlighted reference to the applicant's initial constitution to make the point that members of this voting constituency were being asked to elect as their bargaining agent an entity which would not permit them to have a voice in the decision-making of the Executive which would govern their destiny, was raising a fundamental issue of major importance to the voter. The



fact that the respondent had no reason to believe that the document was not current and the fact, that the respondent identified its source so that the statement was technically correct could not affect the perception of a recipient of the communication that this was indeed the current constitution.

13. We note that as soon as the respondent learned of the factual inaccuracy it immediately took steps designed to rectify the matter. This attempted rectification however, in our view, was deemed to be ineffectual because of the combination of time constraints arising from the fact that there was but one more day in which the school would be open and the impending onset of the silent period. The applicant's efforts to combat the impressions created by the respondent's first letter, in our view were similarly ineffectual and for the same reasons. For these reasons, the Board is of the opinion that the vote was unlikely to disclose the true wishes of employees.

14. The question remains as to whether the applicant by waiting until May 25 to request the direction of a new vote, has failed to move on a timely basis. It is noted that the applicant, immediately in becoming aware of the respondent's action notified both the respondent and the Registrar of its concerns and that it was reserving "any legal rights which may be available". It is also noted that as of the time of such written communication (received by the Board on May 14), the applicant was aware of the respondent's agreement to distribute a retraction but that because of time constraints such retraction would not be by mail. The applicant was not then aware as to what would be the form of the respondent's retraction.

15. It seems to us that the applicant moved expeditiously under the circumstances. Of more importance to the Board, however, is that the result of the vote cannot be relied upon as a true expression of the wishes of the employees upon which the Board may act. The Board therefore directs that the vote of May 17, 18 be set aside and that a new vote be held.

16. The voting constituency shall be as previously set out in the Board's decision of May 9, 1979 and all employees of the respondent in such voting constituency, as of the date of this Order who have not voluntarily terminated their employment or who have not been discharged for cause between that date and the date the vote is taken will be eligible to vote.

17. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER J.D. BELL:**

1. I disagree with the decision of the majority to direct a new vote be held at McMaster.

2. The letter of May 9th issued by the respondent contained the best information re the constitution of the applicant union that was available to the public at that time. However when the applicant expressed concern to the respondent that the information was not up to date and supplied the new constitution, the respondent took all reasonable steps to make this information available to the voting constituency. Further the applicant also had an opportunity to reply by letter and by poster up to and including May 13th.

3. It can not be said the issuing of the letter of May 9th precluded the applicant of a meaningful opportunity to reply as four clear days were left before the silent period began.

4. The group of employees are graduate assistants at the university and as such are the intellectual elite of the student body. They must be quite capable weighing all information before them and making their own decisions. For the majority to presume that the ballots they cast are not a true expression of their wishes is an insult to their intelligence

5. The parties have advised the Board that agreement has been reached on the disputed ballots and who is eligible to vote. I would therefore deny the request for a new vote and finalize the count of the vote held on May 17, 1979.

**0368-79-R United Steelworkers of America, (Applicant)**  
**v. Radio Shack and A & A and Tandy Electronics Limited, (Respondents).**

**Related Employer – Corporate re-organization removing certain employees from bargaining unit – Section 1(4) designed to preserve bargaining rights threatened by non-arm's length restructuring.**

**BEFORE:**Kevin M. Burkett, Vice-Chairman and Board Members C. Ballentine and F.W. Murray.

**APPEARANCES:***James Hayes and Gaye Lamb for the applicant; B.W. Binning for the respondent Tandy Electronics Limited.*

**DECISION OF THE BOARD;**July 17, 1979

1. This is an application under section 1(4) of the Act in which the applicant trade union claims that associated or related activities or businesses are and were carried on by Radio Shack, A & A and Tandy Electronics Limited at a common location, namely 279 Bayview Drive, Barrie, Ontario and that these companies are one employer for purposes of the Act. The applicant seeks a declaration to this effect from the Board.

2. The facts in this case may be summarized as follows. The parent company, Tandy Corporation, Fort Worth, Texas, as part of its overall operations, is engaged in the manufacture and retailing of stereo and other electronic equipment on a worldwide basis. The parent operates in Canada through a wholly owned subsidiary, Tandy Electronics Limited (Alberta). There are presently three divisions of Tandy Electronics in Canada; A & A Canada imports electronic equipment, T.C.E. Canada manufactures antennas and power supplies, and Radio Shack Canada distributes and retails the company's product line. Each of the Canadian divisions are under separate management reporting directly to the Fort Worth head office. There is no manager in Canada who co-ordinates the activities of the Canadian Divisions. Prior to November, 1978 the importing function was carried on through A & A International, a non-Canadian based subsidiary of the parent. As the result of a ruling handed down by Revenue Canada in July, 1978 the Company took the decision to establish a separate Canadian importing division; A & A Canada reporting directly to corporate headquarters in Fort Worth. The company operates a distribution centre in Barrie, Ontario and at all material times both Radio Shack distribution personnel and A & A Canada personnel have been housed in the same facilities. A & A Canada places orders through A & A

International who deal with overseas manufacturers in the name of A & A Canada. Imported goods are cleared through Customs by A & A Canada and are checked on arrival at the company's Barrie distribution centre by Radio Shack Canada quality control personnel. If the defective ratio on the random check is greater than 3 per cent, A & A Canada quality control personnel are called in to do a 100 per cent check. If the goods are found to be defective they are either reworked by A & A Canada or sent back. It is A & A Canada who is legally entitled to claim compensation for defective goods from the manufacturers.

3. The applicant union filed an application for certification in respect of the employees of Radio Shack on June 6, 1978. At that time the 100 per cent check and the reworking now being done by employees of the A & A Canada Division was being done by employees of Radio Shack; albeit on a reduced scale. There is no dispute between the parties that the employees who performed these functions at the time of the filing of the application for certification were included on the lists of bargaining unit employees submitted by the company. These employees, however, did other work as well for Radio Shack. The union was certified as bargaining agent for both a full-time and a part-time unit of employees of Radio Shack employed at Barrie. The company did not seek to distinguish between employees performing the 100 per cent check of incoming goods for A & A International at the time of the application and the remainder of those employees affected by the application for certification. In light of the separate A & A Canada Division which has existed since November, 1978, the company now takes the position that A & A Canada employees are not covered by the certificate issued by the Board. A & A Canada presently employs approximately 8 persons who would fall within one or other of the two bargaining units. Two of these employees performed the same functions with Radio Shack prior to November, 1978.

4. The evidence establishes that A & A operates under separate management from Radio Shack and reports directly to the Fort Worth Headquarters. A & A Canada employees are hired by A & A Canada and their terms and conditions of employment are set by A & A Canada. A & A Canada maintains a separate financial statement and charges Radio Shack for the services performed by it. In all material respects the relationship between A & A Canada and Radio Shack Canada is the same as that between T.C.E. Canada and Radio Shack Canada. T.C.E. Canada also reports directly to company headquarters and maintains its own financial statements. Radio Shack performs a payroll function for both T.C.E. and A & A, both rent space from Radio Shack and as of the date of certification the service and parts employees of Radio Shack worked in the same building as the T.C.E. employees. The union filed a separate application for certification in respect of T.C.E. employees in November, 1978. Neither party sought to link the T.C.E. employees and the Radio Shack employees when separate applications were filed in 1978 and at all material times they have been treated by both parties as two separate and distinct groups of employees.

5. The union argues that the evidence establishes Radio Shack and A & A Canada to be associated or related businesses carried on under common control or direction and asks the Board to exercise its discretion under section 1(4) of the Act and make the declaration sought. The union maintains that in circumstances where a company restructures its operation, for whatever reason, it ought not to be permitted to interfere with the scope of bargaining rights where the employees who were within the bargaining unit continue to do the same work at the same location but under the direction of a related business. The union points out that T.C.E. Canada was set up long before the union applied for certification and has been treated by the parties from the outset as a separate entity and argues that while the



corporate relationship of T.C.E. Canada to Radio Shack Canada may be the same as the relationship between A & A Canada and Radio Shack Canada, the Board should exercise its discretion under section 1(4) in respect of Radio Shack Canada and A & A Canada on the basis of the effect which the company's internal reorganization, which took place after the application, has had on the union's bargaining rights. The union is not seeking a section 1(4) declaration in respect of Radio Shack Canada and T.C.E. Canada.

6. The company maintains that Radio Shack Canada and A & A Canada are not under common control or direction and consequently, the Board has no authority to make the declaration sought by the union. The company argues that prior to November, 1978 the quality control function was subcontracted from A & A (Nevada) to Radio Shack and maintains that an employer has a right to end a subcontracting arrangement without it being subject to a section 1(4) declaration. The company claims that the union continues to represent all of the employees of Radio Shack who work for Radio Shack Canada within the defined unit and in the result there has been no erosion of the union's bargaining rights. It is the company's position that the Board cannot find A & A Canada and Radio Shack Canada to be related employers having already treated T.C.E. Canada and Radio Shack Canada as distinct entities when in fact the same corporate relationship exists between A & A Canada and Radio Shack Canada as exists between T.C.E. Canada and Radio Shack Canada.

7. Section 1(4) of the Act provides:

"Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

Section 1(4) of the Act is designed to deal with situations where more than one legal entity carries on related business or activities under common control and direction and where "it may not make industrial relations sense to allow the legal form to dictate and possibly fragment the collective bargaining structure." There are three conditions which must be met before the section can be applied.

- (a) There must be more than one corporation, firm or individual association or syndicate involved.
- (b) These entities must be under common control or direction, and
- (c) they must be engaged in associated or related business activities.

If these three conditions are met the Board is given a discretion under the statute to make a declaration that the entities in question constitute one employer for purposes of the Act. The Board has consistently exercised its discretion under section 1(4) to preserve rather

than to extend bargaining rights. It has been reluctant, however, to make a section 1(4) declaration where the applicant union has delayed its application with the result that the declaration will impose a bargaining agent upon a group of employees who may desire a different bargaining agent or no bargaining agent at all.

8. It is clear on the evidence that A & A Canada and Radio Shack Canada carry on related business and are under common control. A & A Canada is the importing arm of Radio Shack Canada and both entities are owned by and report directly to the Tandy Electronics Corporation of Fort Worth, Texas. The preconditions to the exercise of the Board's discretion under section 1(4) of the Act are established in evidence and hence the issue which must be decided is whether or not the Board should exercise its discretion under section 1(4) and grant the declaration sought by the trade union.

9. The union has moved expeditiously in this matter so that the Board does not feel constrained by reason of the passage of time. This is not a case where the Board should refuse to exercise its section 1(4) discretion and defer to the certification procedures under the Act because the passage of time has given rise to a legitimate expectation by those who may be affected that they are unrepresented and have a right to choose a bargaining agent of their choice. In this case the employees who were doing the same work at the same location as those now claimed by the company not to be represented by the union were considered by the parties at the time of the application for certification as falling within the scope of the union's recognition. At that time the work was done by Radio Shack Canada on a sub-contracting basis between corporate relatives. They are no longer considered by the company to be covered by the scope of the union's recognition by reason of the work in question being done by a newly established corporate relative and no longer performed by Radio Shack. Although the changes which have taken place have been described by the company as the termination of a sub-contracting arrangement wherein Radio Shack was paid to perform certain work and the establishment of a separate and distinct entity to perform the same work, in reality the Board is faced with an internal corporate reorganization. Work which was previously done by one arm of the Tandy organization is now being done by another arm of the Tandy organization at the same location and with some of the same employees. Although the change was made for sound business reasons and was not in any way motivated by a desire to oust the representation rights of the trade union in respect of the employees performing the work in question, the effect has been to remove these employees from the union's recognition. Section 1(4) of the Act was designed to preserve bargaining rights which are threatened by non-arm's length restructuring as in the instant case. Employees who have been represented by a trade union should not be left unrepresented as the result of a corporate reorganization, regardless of the motives for the reorganization. Accordingly, the Board hereby declares that Radio Shack of Canada, a Division of Tandy Electronics and A & A Canada, a Division of Tandy Electronics, both of whom carry on business at 279 Bayview Drive, Barrie, constitute one employer for purposes of *The Labour Relations Act*. In the result the persons who are employees of A & A Canada in Barrie within the meaning of the Act and who are not otherwise excluded from either of the bargaining units for which the union holds bargaining rights are represented by the applicant trade union.

10. The decision does not speak to the relationship between Radio Shack Canada and T.C.E. Canada for purposes of *The Labour Relations Act*. While the evidence before the Board might support a finding that those two entities are under common control and direc-

tion and carry on related activities the Board would be reluctant to exercise its discretion under section 1(4) of the Act to declare those two entities to be one employer for purposes of the Act. The parties have treated them as separate from the outset, in contrast to the instant case, and consequently a heavy onus would fall to the union to convince the Board that it was not attempting to extend, rather than preserve, its bargaining rights if a section 1(4) application were to be made in respect of T.C.E. Canada and Radio Shack Canada.

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**2092-78-U** Canadian Union of Public Employees and its Local 1320,  
(Complainant) v. **Scarborough Centenary Hospital Association**, (Respondent).

Change in working condition – free parking privilege not part of collective agreement – notice revoking privilege given during first statutory freeze, but prior to second statutory freeze – privilege revoked during second statutory freeze – whether permissible

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members F.W. Murray and W.F. Rutherford

**APPEARANCES:** T. Edwards and A. Correa for the applicant; Murray Levis for the respondent.

**DECISION OF R.O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER F.W. MURRAY;** July 3, 1979

# I

1. This is a complaint filed under section 79 of *The Labour Relations Act* alleging that the respondent has breached the “statutory freeze” provisions of *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1970, c. 208, as amended (hereinafter “*HLDA*”) by revoking the privilege of free parking. Section 10 of the *HLDA* reads as follows:

“Notwithstanding subsection 1 of section 70 of *The Labour Relations Act*, where notice has been given under section 13 or 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and, no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.”

This section of the *HLDA* freezes the employer-employee relationship in its entirety, from



the time that notice to bargain is given until a new collective agreement is in effect between the parties. The union contends that free parking was a benefit "frozen" by section 10, and that the respondent was not entitled to unilaterally revoke it.

2. The present complaint is the second one between these parties involving the allegedly illegal revocation of free parking. The first complaint arose in June, 1978 and was triggered by a notice from the respondent, dated May 4, 1978, indicating its intention to charge a parking fee from June 1, 1978. By a decision dated 18th July, 1978 (and reported at [1978] OLRB Rep. July 679) the Board upheld that complaint, and directed that the respondent reinstate free parking and compensate the aggrieved employees for any parking charges illegally imposed. It is unnecessary to repeat the Board's reasoning in detail; it is sufficient to note its conclusion:

"In other words, the Board has found that in order to protect the purpose of section 70, *a party who wishes to revoke a privilege which may reasonably be expected to continue or re-assert a right which has been consistently waived must do so or communicate its intention to do so prior to the commencement of the freeze period* so that minimal disruptions to the employment relationship will arise to interfere with the ongoing negotiations.

In the instant case the privilege of free parking, which the employer had extended to the employees for more than a decade and which the employees had every reason to anticipate would continue in the future, was unilaterally revoked during the freeze period without the consent of the trade union. *Because the employer neither exercised its right to revoke the privilege outside the freeze period nor communicated its intention to do so prior to the freeze*, the Board finds that the respondent has violated the provisions of section 70(1) of the Labour Relations Act, as modified by section 10 of the H.L.D.A. Act. Accordingly, the Board orders that the hospital *forthwith reinstitute the privilege of free parking for employees and reimburse all employees for charges made for parking in violation of the freeze period.*"[Emphasis added]

The effect of this Board decision was to preserve the benefit of free parking until the parties were bound by a new collective agreement – an event which, in the result, required resort to compulsory interest arbitration, the issuance of an award, and the incorporation of that award into a new agreement. However, the Board recognized that once a new agreement was executed, the respondent would be free to vary or revoke any benefit not specifically provided in the collective agreement.

3. There is no dispute that the parties' "old" collective agreement expired in March 1978; that their subsequent negotiations did not resolve all of the matters in dispute, and that the unresolved issues were submitted to a board of arbitration composed of Robt. Davidson (chairman), H. Simon and B. Varty. Since the parties had previously agreed that their 1978-79 agreement should expire on March 31, 1979, the board of arbitration accepted this agreement and did not deal with the matter. The board of arbitration issued its award on December 20, 1978. Pursuant to section 6(2) of the HLDAA it remained seized of all matters in dispute between the parties until a collective agreement was in effect between them. The issue of free parking was dealt with as follows:

### “PARKING

The Hospital posted a notice to all its employees, dated May 4, 1978, stating that a charge of five dollars per month, in the form of a payroll deduction or fifty cents per day, would be charged for parking as of June 1st and that a five dollar deposit for the magnetic cards required to activate the gate would be charged as well. The Hospital at no time prior to the initiation of this change sought the consent of the employees or the Union in this matter.

It is recognized that there were no charges made for parking prior to May 4, 1978, and that there were employees who did not require or use parking facilities. It is considered, however, that those who did use such facilities, at no cost to them, considered that free parking was part of the rights and privileges of their employment. The subject of parking costs has not, as far as the evidence reveals, been a subject of negotiations in past Agreements and the Board is not aware of any alternative parking conditions.

In this instance, the privilege of free parking which the Hospital had extended to all its employees for many years was unilaterally revoked without, as above noted, discussion with or the consent of the employees or the Union.

*As, under section 70(1) of the Ontario Labour Relations Act, the employer shall not alter the employees' rights or privileges during the period of contract renewal unless with the consent of the Union, we award that the Hospital shall forthwith reinstate the privilege of free parking for employees in the bargaining unit and reimburse all such employees affected for parking charges paid by them since June 1, 1978.* [Emphasis added]

The dissenting member of the Board commented:

“The requirements of section 70(1) of the aforesaid Act are expressly applicable to only the period of time between the date when notice is given of intent to bargain a collective agreement and the date when the negotiations have been completed. However, the award of this Board appears to deny the Hospital its legal right to alter the free parking privileges at any time outside the period of negotiations. With this award I must dissent.”

4. These references to section 70 of *The Labour Relations Act*, and the requirement that the respondent “reinstate” free parking and “reimburse” its employees are somewhat puzzling. A board of arbitration is expressly prohibited from dealing with matters within the exclusive jurisdiction of the Labour Relations Board (see section 6(1) of the HLDA). and in any event the Labour Relations Board had already dealt with the matter in its July decision. Of course, the arbitration board does have jurisdiction to include free parking in the package of wage and fringe benefits in its arbitration award. In the present case, this could transform what was previously an *ex gratia* benefit into a provision of the agreement which

could not be unilaterally withdrawn. In view of the dissenting member's remarks, it would appear that this may have been the arbitration board's intention. It is certainly clear that the board intended to preserve the benefit of free parking, at least until the expiry of the agreement on March 31, 1979.

5. The respondent has been attempting to do away with free parking for a number of months and has only been prevented from doing so by the statutory freeze. In fact, the issue of free parking has been the subject of other proceedings before the Board in addition to those mentioned above. (See: *Scarborough Centenary Hospital Association* [1979] OLRB Rep. Jan. 56.) It must have been apparent to the employees that the hospital intended to revoke free parking as soon as it was permitted to do so. The employees could not reasonably expect that the privilege would continue past March 31, 1979.

6. On December 27, 1978 the respondent notified the union that it would begin to charge for parking "effective April 1, 1979 or sooner if permitted." By letter dated January 15, 1979 the union gave notice to bargain for a new (1979-80) collective agreement to replace the one which the parties had agreed would expire on March 31, 1979 but which had not yet been finalized. This notice to bargain, if effective, would trigger a "new" freeze until the parties have concluded their 1979-80 agreement; however, the "old" freeze (i.e., the one referable to the 1978-79 negotiations) would also remain in place until the 1978-79 collective agreement was in effect. The manner in which an arbitration award is transformed into a collective agreement is governed by sections 7(5) – 7(7) of the HLDA:

"(5) Within five days of the date of the decision of the board of arbitration or such longer period as may be agreed upon in writing by the parties, the parties shall prepare and execute a document giving effect to the decision of the board and any agreement of the parties, and the document thereupon constitutes a collective agreement.

(6) If the parties fail to prepare and execute a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties within the period mentioned in subsection 5, the parties or either of them shall notify the chairman of the board in writing forthwith, and the board shall prepare a document in the form of a collective agreement giving effect to the decision of the board and any agreement of the parties and submit the document to the parties for execution.

(7) If the parties or either of them fail to execute the document prepared by the board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under *The Labour Relations Act*."

7. Following release of the December 20, 1978 award, the parties met in order to settle the contract language; but were unable to agree on appropriate language with respect, *inter alia*, to the issue of free parking. The employer took the position that free parking should not be included as a term of the agreement. The union wrote to the chairman of the



arbitration board requesting him to resolve the matter. In response to the union's request, the chairman of the arbitration board wrote:

"This subject resulted in lengthy debate at the Arbitration Board meetings and *Mr. Simon did emphasize repeatedly that the conclusion reached (with one dissent) covered the period to March 31, 1979.* My notes clearly indicate that, inasmuch as the subject of parking was not in previous agreements and did not arise until a date midway in, or certainly late in the period covered by the Agreement with which we were concerned, the subject of parking should be adjudicated and reimbursement made to those employees who had been required to pay parking charges since June 1, 1978.

If, in the forthcoming agreement, this subject is introduced, it must be negotiated "between the parties. Our job was to resolve the issues before us and to make adjustments which, in our opinion, were necessary within the period covered by the agreement. Accordingly, it is my opinion that the *subject of parking, having been adjusted for the period from June 1, 1978, to March 31, 1979,* should not appear as an article in the 1978 agreement." [Emphasis added]

Again, it is apparent that the arbitrator intended to create a benefit which would remain in effect until March 31, 1979 – the date on which the parties wished their 1978-79 agreement to terminate. It is not clear how the arbitrator expected to create an enforceable right if it were not to be included as a term in the collective agreement.

8. Following receipt of the arbitrator's letter, the union made no further request to the board. On March 7, 1979, the parties executed a document which purports to be a collective agreement and has a nominal expiry date of March 31, 1979, (as they had previously agreed.) The purported agreement does not contain any reference to the benefit of free parking, but the respondent did continue to provide free parking until March 31, 1979. Most of the terms of the agreement have been implemented, although by the date of the hearing, the wage provisions were still subject to A.I.B. approval.

9. On March 8, 1979 (i.e., during the currency of the purported agreement *and* during the freeze triggered by the January 15th notice) the respondent notified the employees of its intention to begin charging a parking fee on April 1, 1979 (that is, after the expiry of the purported agreement and the freeze which preceded it, but still during the alleged freeze triggered by the January 15th notice.) This announcement simply repeated what the respondent had already advised the trade union on December 27, 1978. On April 1, 1979 the respondent began to charge for parking.

## II

10. For many years the employees represented by the applicant have enjoyed the benefit of free parking; but that benefit has never been a part of any collective agreement, and has never been a term or condition of employment. Free parking has always been a "privilege" which, (subject to section 10) the respondent was entitled to rescind if it wished to do so. The arbitration award of December 20, 1978 did not alter this situation. The award

does not contemplate the continuation of free parking beyond March 31, 1979. The arbitrator did not require that this benefit be included as a term of the collective agreement. He chose not to make free parking a term or condition of employment or an enforceable contractual right. Likewise the parties executed and implemented a document which was silent with respect to parking. We find that this document is a collective agreement even though some of its terms have not been implemented pending approval by the A.I.B. The execution of this agreement ended the freeze associated with the 1978 negotiations and terminated the Labour Relations Board order of July 18, 1978 which preserved free parking until the 1978-79 agreement was in effect. As a result, the only "freeze" which could be applicable on April 1, 1979 is that associated with the 1979-80 negotiations and triggered by the January 15th notice to bargain.

11. The second, or new, freeze would preserve the *status quo* existing as at January 15, 1979, except insofar as the situation has been modified subsequently by the mutual agreement of the parties. However, the term "status quo" is somewhat misleading, since it suggests a static situation while, in reality, the "status quo" is dynamic. On January 15, 1979 the relationship between the parties consisted of the previous collective agreement, the arbitration award which the parties were in the process of transforming into a new collective agreement, and any "privileges" then existing, i.e., established *ex gratia* benefits which the employees could reasonably expect to continue. Free parking was being provided on January 15, 1979; but the respondent had already indicated its intention to revoke this benefit, and this notice was given prior to the onset of any freeze triggered by the January 15th notice. Thus the revocation of the privilege was set in motion prior to the freeze. The arbitrator could have transformed this privilege into a collective agreement term which would then have been preserved by the freeze; but the award does not contemplate the continuation of free parking past March 31, 1979 and the arbitrator did not choose to include free parking in the collective agreement. As a result, the legal character of this benefit remained unchanged. The respondent remained free to rescind free parking in accordance with its expressed intention communicated to the union on December 27, 1978.

12. The Board is satisfied that in implementing paid parking the respondent was merely following through with its pre-established plan, and was not in violation of section 10 of the HLDAA. While free parking was undoubtedly a privilege in existence on January 15, 1979, it was a privilege subject to a specific limitation which had been established prior to the onset of the freeze. The privilege "expired" on March 31, 1979, as the employer had previously advised that it would. Section 10 of the HLDAA does not revive it, or override the limitation to which it was subject. What was preserved was a benefit of limited duration which, being extrinsic to the collective agreement, was not preserved by the statutory freeze. It might also be observed that the result which we have reached seems consistent with the intention of the board of arbitration.

13. Having regard to the foregoing, the complaint is dismissed.

#### **DECISION OF BOARD MEMBER W.F. RUTHERFORD:**

1. After having considered the decision of the majority of the Board, I find that I cannot agree.
2. The complainant alleges that the respondent Hospital has breached Section 10 of

*The Hospital Labour Disputes Arbitration Act* by revoking the privilege of free parking during the “statutory freeze period imposed by that Act.”

3. The privilege of free parking had existed since the opening of the Hospital in 1967. On May 4th, 1978, the Hospital posted a notice of its intention to charge employees for parking as of June 1st, 1978.

4. In a decision dated July 18th, 1978, [1978] OLRB Rep. July 679, the Board directed the respondent to reinstate the privilege of free parking and to repay employees for the parking fees that had been collected from them.

5. The free parking issue was referred to arbitration pursuant to *The Hospital Labour Disputes Act*. The arbitration board maintained the privilege of free parking for employees, but only for the life of the agreement, which expired on March 31st, 1979.

6. The Hospital and the Union discussed parking for employees in the last round of negotiations as a contractual issue. The issue was submitted to the arbitration board when the parties were unable to resolve the matter. The fact that the arbitration board stated that free parking would only continue to the end of the contract is irrelevant. In my opinion it is no different than any other term or condition of employment that may come up for renegotiation on termination of the contract. To accept the position of the majority in this case would be contrary to the Board’s jurisprudence which requires the maintenance of the status quo in the employment relationship during the “statutory freeze” period.

7. In the instant case there was an overlap of the freeze periods imposed by section 10 of the Act due to the length of the negotiations and the resulting arbitration proceedings. Because compulsory arbitration is imposed by *The Hospital Labour Disputes Arbitration Act*, there is no pressure on either party to reach an immediate settlement of the contractual issues. They are content to leave it to the Arbitration Board to resolve their differences rather than hammering them out at the negotiating table.

8. In the instant case, the arbitration board stated that free parking for employees continue to the end of the agreement. Once the arbitration board found that free parking should continue, they did not need to suggest that it carry on past the termination of the contract in order for it to become caught by the statutory freeze. If the parties cannot effect a settlement in this round of negotiations, an arbitration board will again decide the terms and conditions of employment which may or may not include the privilege of free employee parking.

9. The current agreement ended on March 31st, 1979. The Union gave notice to bargain for a new collective agreement on January 15th, 1979. However, at that time the parties were still under the statutory freeze which commenced on May 4th, 1978 and did not end until the collective agreement which expired on March 31st, 1979, was signed on March 7th, 1979. Thus there was an overlap of the two freeze periods. The first statutory freeze period continued when the second statutory freeze period commenced on January 15th, 1979. In my view, the Hospital cannot revoke the privilege of free parking since it is a privilege which was in existence at the time the second freeze period commenced and the first freeze period was still continuing.



10. During the current negotiating sessions the parties will no doubt once again discuss employee parking. Now it will be up to the Hospital which has made employee parking a monetary issue to either bargain with the Union over that issue, or if the parties are again unable to resolve the matter during the negotiations to submit the question to compulsory arbitration.

11. As the freeze under section 10 the *The Hospital Labour Disputes Arbitration Act* was in effect at the time the Hospital revoked the privilege of free parking, I am of the opinion that the Hospital has violated section 10 of *The Hospital Labour Disputes Arbitration Act* and would order that the Hospital forthwith reinstate the privilege of free parking for the employees and reimburse all employees for charges made for parking in violation of the Act.

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**1314-77-R** Spar Professional and Allied Technical Employees' Association, (Applicant), v. **Spar Aerospace Products Ltd.**, (Respondent), v. Group of Employees, (Objectors).

**BEFORE:** Arthur L. Haladner, Vice-Chairman, and Board Members O. Hodges and R.W. Redford.

**APPEARANCES:** *James Hayes, Maurice Green, S.S. Sachdev, E. Quittner and G. Whitehead for the applicant; J. Perry Borden, Q.C., Barry H. Bresner, E. Peter Birch, Eric R. Grimshaw and Rob Giel for the respondent.*

**DECISION OF ARTHUR L. HALADNER, VICE-CHAIRMAN, AND BOARD MEMBER O. HODGES; July 26, 1979**

1. This is an application for certification. In a decision dated May 29, 1978, the Board, pursuant to the provisions of section 6(1a) of *The Labour Relations Act*, certified the applicant as bargaining agent for all employees of the respondent employed in the municipality of Metropolitan Toronto as professional engineers, engineers, engineers-in-training, scientists and allied technical employees, save and except employees reporting directly to vice-presidents and those above the rank of such employees, all persons covered by the collective agreement between U.A.W. Local 673 and Local 112 and the respondent, those persons employed in the personnel and employee relations, finance, marketing and contracts, pricing and program analysis departments, and the manufacturing, repair and overhaul division, persons regularly employed for not more than twenty-four hours per week, and students employed during the school or university vacation or on work term assignment and, pending final resolution of the composition of the bargaining unit, also excluding *group leaders, section chiefs, supervisors and managers*. In that decision, the parties were advised that the final resolution of the composition of the bargaining unit would be determined following the report of the Labour Relations Officer.

2. The report of the Labour Relations Officer, a four-volume report consisting of 992 pages and 57 exhibits, was released to the parties on November 24, 1978. Both parties

requested a hearing before the Board to make representations, and this hearing was conducted on January 23, 1979, after which further written submissions were received.

3. It is the position of the respondent that the persons sought to be included in the bargaining unit are persons who fall within the provisions of section 1(3)(b) of *The Labour Relations Act*, and accordingly are persons deemed not to be employees for the purposes of the Act. More specifically, the respondent objects to the inclusion of persons in the underlined classifications on the ground that they exercise managerial functions. It also objects to the inclusion of persons in certain other agreed-upon classifications, namely, industrial engineer, senior cost estimator, and manufacturing cost and budget analyst, on the ground that they are employed in a confidential capacity in matters relating to labour relations and lack a community of interest with the bargaining unit employees.

4. The “confidential” objection can be disposed of briefly. The evidence indicates that none of the persons in the agreed-upon classifications, all of whom perform traditional industrial engineering and estimating functions, supplying information to others, are privy to confidential information of the type which, if exposed, would adversely affect the interests of the employer. It is noteworthy that all of the information they use, including projected labour rates, is available to bargaining unit employees. None of the persons in the disputed classifications have access to individual salary rates or play any role in negotiations. The Board finds that persons in these classifications are not employed in a confidential capacity in matters relating to labour relations, and they they fall within the bargaining unit.

5. The “community of interest” objection can be disposed of with even greater dispatch. The evidence disclosed no justification for such an objection, and none was advanced.

6. The “managerial exclusion” objection, on the other hand, raised an important issue in the Board’s administration of section 1(3)(b). This is the first occasion that the Board has been called upon to determine the application of the managerial exclusion in a scientific and professional engineering context, and it is to this issue that we now turn.

7. Section 1(3)(b) of *The Labour Relations Act* states:

“1(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

8. In *Chrysler Canada Ltd.*, [1976] OLRB Rep. Aug. 396, the Board had this to say about the section’s purpose:

“The identification of management is fundamental to the scheme of collective bargaining as set out in *The Labour Relations Act*. What is contemplated is an arm’s length relationship between the employees represented by a bargaining agent, on the one side, and the employer

acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.”

9. Because the Act does not contain a definition of the term managerial functions, the task of developing criteria which can identify members of management has fallen to the Board. In recognition of the fact that the exercise of managerial functions may assume different forms in different settings, the Board has identified two benchmark situations – one where there is direct influence upon the employment relationship, and one where the influence upon the employment relationship is only indirect (see *Inglis Limited*, [1976] OLRB Rep. June 271). The Board has said that the more indirectly the exercise of a person’s job responsibilities influences the employment relationship of others, the more it looks to independent decision-making as the criterion for identifying that person as management; whereas the more directly the exercise of a person’s job responsibilities influences the employment relationship of others, the more it looks to effective control or authority over other persons as the criterion. (See *Chrysler Canada Ltd.*, *supra*.)

10. The situations identified in *Inglis* are, of course, as the Board stated in *Chrysler*, only benchmarks and there is the possibility of many variations between them. The general criteria, although helpful in elucidating the problem of management identification, cannot, moreover, be mechanically applied, so as to resolve all situations. The different forms that the exercise of management functions may assume dictates that each situation be dealt with on an individual basis. (See *The Globe and Mail Limited*, [1976] OLRB Rep. Nov. 662; *Carleton University*, [1975] OLRB Rep. June 500; *Chrysler Canada Ltd.*, *supra*). Further, the Board has indicated that it must be cautious in using the industrial model to make assessments about non-industrial or white collar situations where the decision-making process and control over employees varies considerably. (See *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154.)

11. In this case, the Board is dealing with a group of professional engineers operating within a highly technical and scientific environment. Before focusing specifically on the duties and responsibilities of the persons in the disputed classifications, it is instructive to describe in a general way the basic structure and character of the respondent’s enterprise. In these respects – nature of decision-making and control of employees – the situation at Spar does deviate significantly from the industrial model.

12. As a competitor in the highly technical aerospace industry, Spar’s corporate structure is keyed to the co-ordination of the diverse tasks being performed by a large number of experts working in a wide variety of specialized fields. The current work in progress is focused upon research, design and production of a Shuttle Remote Manipulator System for delivery to the NASA space shuttle program in the United States. The company is currently engaged in numerous additional research and development projects of equivalent sophisti-



cation involving subcontractors and customers in both the public and private sectors. Although the company is organized along divisional lines, wherein the three operating divisions (RMS, Engineering and Manufacturing) have responsibilities for doing work for money on a profitable basis and for providing service and specialist skills, the company functions on a "matrix"-project-oriented-basis for purposes of organizing the technical work required. This work is accomplished by sections, groups and sub-groups of engineers and scientists assembled on the basis of technical expertise to work together for defined projects or project support purposes. Typically, the groups are headed by a group leader who co-ordinates and gives technical leadership to the work of his team. The size and continued existence of groups depends entirely upon the ongoing requirements of the program concerned. Overall program direction and co-ordination – including quality control, budget design, scheduling and plan modification – is typically handled by levels of technical control boards in addition to the more senior individuals functioning at the level of program management.

13. This form of business organization relies upon the matching of the professional expertise of employees, individually and in combination, to the exigencies of a rapidly changing scientific program. The form of organization is necessarily fluid and depends for its definition upon the technical objectives of the moment. Individual responsibility may ebb and flow and is determined by the program itself as it places demands upon technical expertise and experience. It is very much a peer situation in which the roles of the players may vary depending upon the stage of the program and the function of the particular group, section or division. For that reason, no common terminologies have been used to describe certain job functions within the company and certain witnesses were unsure as to the "official job titles" of themselves or their colleagues. There are, of course, persons at Spar who occupy positions clearly identifiable on a more permanent – and traditional – hierarchical "line structure". This structure is headed by a president, followed by a vice-president and general manager for each of the three divisions, and in turn by various directors in each division who report directly to their representative vice-presidents. The Spar matrix is formed by the superimposition of the project function, which generates the work upon the line organization which services the various projects.

14. Within this "matrix" form of organization, decision-making has been diffused to the extent that important recommendations both as to policy and personnel originate at the level of group leader, and below, as these persons engage their professional colleagues in response to their scientific and engineering assignments. That is not to say, however, that decision-making is "fragmented" in the sense described in *McIntyre Porcupine Mines Ltd.*, [1975] OLRB Rep. Apr. 261, the decision upon which the respondent places primary emphasis. By contrast with the situation in *McIntyre*, decision-making authority at Spar is extremely centralized residing in a small cadre of managers having ultimate control over every aspect of the company's operation. Although each employee at Spar has, by reason of his specialist training and expertise, significant input into the decision-making process, all recommendations proceed upward through a number of tiers of authority wherein successive recommendations are made until an ultimate decision is reached at the level of a director, vice-president, or the president himself. Decisions are made, and permission for various courses of action is granted, only at the top after senior management have checked and balanced the recommendations made by expert personnel at any level of the company. The tight control exercised by senior management is illustrated by the fact that all recommendations for overtime must be approved by the vice-president or president.

15. An understanding of the way in which Spar employees are supervised requires an appreciation of the distinction between “executive” and “colleague” authority. This distinction is nicely drawn in the following excerpt from a study on professional employees by Professor W. D. Wood, *Personnel Administration and Professional Employees*, Industrial Relations Centre, Queen’s University, Reprint Series No. 3:

“Executive authority is found in the traditional business organization, where the boss has complete authority and gives orders without being expected to defer to the opinions of subordinates. Colleague authority, on the other hand, permits persons of unequal status to participate in decisions. Professional employees adopt to a system of colleague authority and find it difficult to accept the conditions of executive authority that usually prevail in industry.

If one accepts the approach of “colleague authority”, then a number of elements of supervision follow. The supervisor is the chairman but not the boss of his professional unit. He provides the environment and climate in which ideas of others will grow. Indeed, he is the catalyst for productive effort. Thus, while encouraging all sorts of individual initiative and listening at times to all sorts of “crazy” ideas, he must find some way of keeping his team on the field.

To ensure that the professional employee is fully motivated, it is essential that he be treated as a full member of the team. In order to reach sound decisions, management frequently takes the professional into its confidence and relies upon his counsel. Thus, the professional staff man wants, and deserves, credit for his original work and for the reports and papers he has developed. He wants above all his unusual contributions to reach the attention of top men.

In view of the foregoing, it is not time to question the effectiveness of the traditional line organization system of directing large numbers of technical and professional employees? It may be that, in attempting to adapt to staff employees a system of supervision originally designed for managing large groups of payroll employees, Canadian industry is “overmanaging” its staff personnel. Even cursory examination reveals that the duties assigned to professional personnel are generally carried out by individuals and rarely can be shared. To the degree that current supervisory methods blur the identification of an individual with his own ideas, management misses opportunities of giving encouragement to its highly trained employees. This, then, is another area where management ought to be directing a great deal of thought. Perhaps the organizational chart of the future for staff groups will look like the scientist’s symbol of the atom – with specialist groups clustering around a management nucleus and advising senior management in the areas of their specialty.”

16. The Board agrees with counsel for the applicant that the Spar approach to supervision bears a strong resemblance to Professor Wood’s model. It is clear from the evidence

that at Spar, which is comprised of many of the most gifted and highly trained scientific and engineering professionals in Canada, supervision plays more of a co-ordinative role than the traditional authoritative or disciplinary one. There are numerous references and descriptions in the transcript to the team or group approach to the work. For example:

"...basically, what really happens is a programme starts in the preliminary development phase where certain people, certain engineers, are put together and a team is formed and the purpose of these people is to talk to each other and sort of do a systems type of a development. As the work progresses, these individuals need more help, more technical help, in order to do their day to day work. The programme is getting more complex, technically more details are required, we're getting into more detailed design phase and these groups are formed. What happens it that a mechanical engineering group doesn't...it will consist of, for example, many different specialized areas. There may be a thermal engineer in it who would look after the thermal aspects and there may be stress analysts or stress engineers, dynamics and mechanical systems type of people and they would work on their own areas to come up with an integrated system of approach, solving the problems in their specialist areas to solve basically...to fulfill the group objectives, which is to come up with a good technically sound system and that's where every member is contributing, including the senior and junior members, and there are times when the person who is acting as a group leader is not as technically specialized as some of the other people who are working in the group...at the beginning of a programme you formulate, or to have a team of people, maybe five or six, who work on the preliminary design phase and as you go from preliminary design phase into a more detailed design phase, there is need for further technical people to come and work in specialized areas, and as you work in these specialized areas, these experienced people who started on the preliminary design phase of the programme happen to sort of assume a primary role in these groups of people, that sort of crystalize over the years as you go through the thing. And, you know, these people who started on the programme are basically like a captain of a hockey team or something like that. This is how these people really happen to be there, they are experienced and they just assume that particular role...I think the analogy of a hockey team or a center in a hockey team is quite good, because these people are experienced and that's how they work."

17. Not only are there significant differences in the type of supervision accorded the respondent's professional employees, the evidence indicates that many of the persons in the disputed classifications spend a considerable amount of time doing work which is identical or similar to that performed by the employees they supervise. Further, the evidence discloses movement, although not as yet to any significant extent, from the position of, for example, section chief to that of project engineer in response to the company's technical requirements. It is to be noted as well that experienced scientists and engineers who are in on the ground floor of a project or program frequently find themselves gradually assuming a leadership role as others are added to the group. There is often no formal promotion or appointment to a leadership position as of a given date.



18. From these general observations, two general conclusions follow:

First: that, at least at the lower levels of the respondent's organizational hierarchy, recommendations by supervisory personnel cannot be considered "effective" in the sense that that term is used by the Board as an indicia of managerial functioning.

There are simply too many levels of authority beyond the individuals concerned. Furthermore, the persons who make these recommendations are not the only presence in the workplace as were the shift bossess and foremen in *McIntyre*. Contrary to the position urged by counsel for the respondent, the fact that the recommendations of lower level supervisors are generally followed does not indicate that at Spar traditional managerial decisions have been supplanted by a system of "effective recommendation". In the Board's opinion, the high level of acceptance which generally attaches to the recommendations of Spar personnel (and it attaches even to the recommendations of persons in positions below the disputed ranks) is generally much more reflective of technical expertise and professional competence than the exercise of managerial functions. As counsel for the applicant put it, at Spar a good recommendation does not necessarily an effective recommendation make.

Second: that there is not in the professional setting existing here the same potential for a "conflict of interest" as might arise if, for example, the frontline supervisor in an industrial operation were included in a bargaining unit with persons they supervise. This labour relations reality was recognized by Professor Adams, the author of the *McIntyre* decision, in his paper on "Collective Bargaining by Salaried Professionals", presented to the National Conference on the Professions and Public Policy, October 15-16, 1976.

19. With these general observations and conclusions, we can now outline what we consider to be the most salient facts relating to the duties and responsibilities of the persons employed in the classifications which are in dispute. We propose to deal first, and as a group, with the classifications of group leader – project, group leader – resource, section leader, and section chief – project (hereinafter referred to as "group and section leaders"). In our view, each of the persons in these four classifications should be disposed of in the same manner. There are marginal differences in duties and responsibilities, and perceptions. However, these differences are not of significant magnitude to warrant different determinations. It should be stated here that the Board has included or excluded from the bargaining unit all persons in the disputed classifications consistent with the approach taken in *McIntyre* and urged by both parties here.

20. Group and section leaders assign work to the members in their groups (sections) but these assignments are generally determined by the technical expertise and experience of group members. For example, if there is work involving structural dynamics, it goes to the person who is the expert in that field. When there is work that can be performed by any of the group members, the assignment is made on the basis of priorities and work loads. It

should be emphasized that while group and section leaders are responsible for the assignment of work, this responsibility is exercised within the framework of the team. As one group leader put it:

“You have a single point contact for the purposes of the rest of the project, for the rest of the engineering world, obviously you have to have some measure of technical control, a single force or funnel of information, but within that team there’s a very free and easy interchange of ideas and responsibilities, it’s a mutual thing. The team are doing the job, I’m merely responsible for making sure the job is done and I’m one of the team.”

21. The same kind of informal control, within the framework of the team, characterizes the group and section leaders’ responsibilities in the area of work inspection. The work of the group (section) is reviewed – checked – for technical accuracy, but this review is collegial in essence wherein disputes are resolved on the basis of professional experience and specialist judgment, almost always by mutual agreement. The review function exercised by group and section leaders is, moreover, by no means final. The work of the group (in the main, technical documents) is also the consecutive responsibility of a number of levels above that of group and section leader, and the documents are executed at each stage. It is to be noted that the work of the group and section leaders is itself reviewed on a peer basis by fellow group and section members and may be changed as a result. All group and section leaders are heavily involved in highly technical bargaining unit work.

22. The Board has concluded that, in the areas of work assignment and inspection, the functions performed by group and section leaders cannot, within the professional and technical setting of Spar, be characterized as “managerial” within the meaning of section 1(3)(b). In so finding, we agree with and adopt the following conclusions of the National Labour Relations Board of the United States in *General Dynamics Corporation – Corvair Aerospace Division*, (1974), 213 NLRB 851, 1974-75 C.C.H. NLRB ¶15, 061, a case involving the determination of managerial status in a professional and technical context, and one in which the employer’s operation, the manufacture of aerospace systems and items for industry and the United States government, was organized on a matrix or project-oriented basis:

“Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status or because work performed in that status may have a bearing on company direction ...

Here while proposal managers and project leaders exercise a certain amount of discretion in assigning work, that discretion in assigning work, that discretion primarily is made by the only people technically competent to make it within the parameters set by the utilization of systems engineering. Such discretions as the professional engineers may have in work assignment and direction, moreover, are exercised in a professional sense and are directly related to a professional responsibility.

ity for the quality of work performed on the projects to which they are assigned. They merely are providing professional direction and co-ordination primarily for other professional employees.”

In *General Dynamics*, which is the only decision of direct relevance to the situation at Spar, the National Labour Relations Board concluded that the Corvair proposal managers and project leaders did not have the type of discretion indicative of managerial status under the *National Labour Relations Act*, a statute which, in terms of its definition of management, is not more narrow than ours.

23. At Spar, control over budget including costing proposals and manpower requirements flows essentially from customer decisions. These decisions are normally preceded by intensive proposal activity including participation by all levels of Spar personnel. Group and section leaders participate in budget formulation to the extent of preparing initial estimates which are done with the assistance of other group members. Apart, however, from some minor “juggling” which is normally done in collaboration with group members, they do not play any additional role in the process of decision-making which takes place at higher levels – the assistant program manager and above. None of the group or section leaders have independent purchasing authority in excess of \$1,000.

24. Group and section leaders have no authority to discharge or discipline and although two (both section chiefs – project) consider they have power to make recommendation in that regard, they have not been so advised. In any event, the most that has occurred is an occasional verbal reprimand for lack of initiative, or the like, and even there proper standards are maintained on an informal and professional colleague bases. By contrast with the situation generally existing in industry, it is clear that discipline does not play an integral part in the respondent’s system of management, as evidenced by the absence at Spar of a system of progressive or corrective discipline. Spar employees, no doubt by reason of their professional training and code of ethics, function in a highly autonomous and responsible manner.

25. With respect to hiring, there is involvement, most notably by the group leaders – resource, who may interview prospective employees – to assess technical competence – and review resumé’s, but others (including the technical director and personnel department) are always involved, and the weight attached to any recommendation for hire is unclear. Group and section leaders have no power to hire and do not inform the person of his appointment; nor do they discuss salary.

26. None of the group or section leaders attend meetings where personnel or labour relations matters are discussed. They do attend numerous meetings dealing with technical matters, some with customers. As indicated, these customer meetings are attended by everyone in the company. Group and section leaders have no power to grant leaves of absence which are governed by a company policy and no power to schedule vacations, although some may be consulted.

27. Persons wishing time off up to a day for personal reasons normally notify a group or section leader as a matter of courtesy, which courtesy is normally reciprocated. It is expected, however, that professional persons have this right and, in our view, notification of departure confers no authority upon the person notified. The procedure for authorizing



overtime which, is stated, is strictly controlled from the very top, is that the group or section leader requests, on a monthly basis, a bulk allocation of overtime hours for the group. This request is subject to the approval of several tiers of authority up to the vice-president, all of whom initial the required form. Requests for individual overtime which are initiated by the person requiring the overtime also require numerous signatures, up to and including the president – in cases where more than ten hours is worked in a week. In this regard, the group or section leader functions as a conduit, passing the request upward.

28. Group and section leaders are responsible for the completion of probationary forms wherein retention or release of the employee can be recommended. However, the company's pre-hire screening process is so selective that this function cannot, as a practical matter, be considered significant. There is not a single example in the transcript of an employee being released while on probation.

29. The evidence indicates that group and section leaders have on occasion participated in performance evaluations of group members by completing, in conjunction with the employee concerned, forms. However, in each case the forms as completed are subject to the review and approval of the next level supervisor who may modify the recommendation as it proceeds up the chain to the highest echelons of the company where a further "normalization" (standardization of ratings), without the input of the section or group leader, occurs. It appears that these forms, which are completed annually, influence the distribution of money for merit increases. However, group or section leaders are not asked for their opinion or recommendations as to the type of percentage of merit increase the group member should receive. The forms are purely rating sheets, and there is no place to recommend a promotion. The evidence indicates that group and section leaders are, for the most part, unaware of the salaries paid to members of their groups.

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30. In our opinion, the limited participation of group and section leaders in performance evaluation ought not to weigh heavily in the determination of their status. As experienced professionals most familiar with the work of their colleagues, they are in a unique position to furnish a technical assessment of their performance. Given the "normalization" which occurs at successive levels, the exercise of this essentially technical evaluative function cannot, in the Spar context, be considered an indicia of managerial authority.

31. It is our conclusion, having regard to the above-noted considerations, that group leader – project, group leader – resource, section leader, and section chief – project, have neither the type of decision-making authority nor type of authority over employees which is indicative of managerial status. Although they possess a certain measure of control over the employees they supervise, this control is of a distinctly technical and professional type and is in all important respects subject to the approval of several tiers of authority beyond the individuals in question. The Board finds that the group leader – project, group leader – resource, section leader, and section chief – project, do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and, accordingly, that they are included in the bargaining unit.

32. The major responsibility of Munn and Rife, the two project managers examined, is to co-ordinate the professional activities of group leaders and project engineers so that the end product of their efforts meets the customer's technical engineering specifications and is completed within the constraints of the budget which is defined by senior management.

Project managers are responsible for the assignment of work to project personnel, but again the assignments are largely determined by the expertise of the personnel available. The task of the project manager is to identify the technical work required and then to ensure that the necessary expertise is present – by negotiating with group leaders and by making requests of senior management for the desired person. Daily review of the technical adequacy of the work is not a primary responsibility of the project managers. As stated, their primary job is to ensure that the end product meets the technical specifications. To this end, project managers chair weekly progress meetings at which the status of the various work units is reviewed and technical problems with respect to costs and schedules are discussed. Project managers' role in budget administration is limited to the reallocation of monies within the budget allotment – from one work package to another. They have no authority to alter the overall budget. Project managers have an independent purchasing limit of \$1,000.

33. Project managers have not been specifically advised of any authority to discharge, although they assume they can make recommendations in that regard. Neither project manager, however, has had occasion to do this. Both assume that they have authority to discipline employees with respect to work performance – by making verbal recommendations as to how the individual's work can be improved – although not with respect to breaches of company rules and regulations. This disciplinary authority does not, in their view, extend to the issuance of written reprimands or suspension.

34. Rife's involvement in hiring is minimal, being limited to the occasional request of a supervisor for additional manpower. He is not in any way involved in the pre-selection interviews or program. Munn does interview, screen resumes, interview applicants and make recommendations as to hiring, but these recommendations are made when he "deputizes" for the manager of the Remote Sensing Department during the periods when the manager is not in the plant, and Munn assumes his authority and responsibilities.

35. Project managers have minimal input into performance evaluation, their input being limited to the completion of rating forms. They have no involvement in the establishment of the rates of pay of persons they supervise.

36. Project managers do not attend meetings where personnel or labour relations matters are discussed.

37. With the exception of the periods when Munn "deputizes" for the Remote Sensing manager, the picture which emerges of the project manager is that of a highly-skilled professional working, in Rife's words, "within the confines of the company's engineering procedures and policies", albeit with a considerable amount of technical responsibility and freedom as regards work performance and deployment of personnel. In these respects, the duties performed by the project managers can be analogized to the powers exercised by department heads in a university who co-ordinate the instruction efforts of their peers (see *Carleton University, supra*; *University of Windsor*, [1977] ORLB Rep. May 300) where department chairmen were included in the bargaining unit. In the Board's view, the exercise of this co-ordinative function is not, in the Spar context, indicative of managerial authority. The Board finds that project managers do not exercise managerial functions within the meaning of the Act and are therefore included in the bargaining unit.

38. By contrast with persons in the previously examined categories, the section chiefs

– resource report directly to the technical director of the company and make recommendations to him without intermediate steps. The evidence establishes, however, that the technical director retains in all cases the ultimate power of decision and that virtually all of their time is spent doing technically-oriented work, whether this be, for example, mathematical calculations or technical co-ordination of the work of the group. Time spent on personnel related matters is minimal. For the most part, section chiefs – resource function in essentially the same manner as the lower level group and section leaders. They assign work on the basis of technical adequacy and are governed by company policies with respect to leaves of absence, vacations and overtime. Section chiefs assume they have authority to issue verbal and written warnings and to recommend suspension or discharge, although they have never been specifically advised. However, with the exception of Davis, who claims to have made an effective recommendation for discharge – Davis “deputizes” for the technical director in the event of the latter’s absence – the actual exercise of disciplinary authority has been confined to the issuance of the occasional verbal warning regarding work performance.

39. Section chiefs – resource play a greater role in screening and interviewing applicants for hire and in the performance evaluation process, and their recommendations are consistently followed, but again assessments are made on the basis of technical competence. It is to be noted that Saadatian has delegated some of his responsibilities in these areas to his section leaders and has generally accepted their recommendations. Section chiefs – resource do not recommend salary increases, although they are aware of the salaries of group members.

40. The Board considers that the greater involvement of the section chiefs – resource in hiring and performance evaluation does not, considering the essentially technical nature of their assessments, make their role different in kind from that of persons in the previous classifications. It should be emphasized that the time spent in the performance of these functions is very minimal and that most of their time is spent doing technical work of a type similar to that performed by bargaining unit employees. The Board finds that the sections chiefs – resource do not exercise managerial functions within the meaning of section 1(3)(b) of the Act and that they are included in the bargaining unit.

41. We do not make the same finding in respect of the manager. The manager, to whom nine people including two section chiefs report, has responsibility to plan, control and report directly to the program manager – on the functions of the RMS program operations. In contrast to the section chiefs – resource, the manager is primarily involved in administrative, as opposed to technical, work and attends, on a regular basis, management, as opposed to technical, meetings. Further, the evidence indicates that the manager has a slightly greater role in hiring and in the performance evaluation process; in almost all cases he screens, interviews, often by himself, and makes recommendations which are consistently followed both as to hiring and salary; by contrast also with the section chiefs – resource, he makes specific recommendations regarding the merit increases to be allocated to the individuals he supervises, and has some discretion in that area. The manager has also recommended, on his own initiative, promotions outside the performance evaluation process. As well, the manager has significantly greater authority in the area of budget and discipline, but these factors do not weigh heavily in our determination of his status. In our opinion, the manager exercises managerial functions within the meaning of section 1(3)(b) and represents the first level of management in the respondent’s project organization. He is therefore excluded from the statutory definition of employee and from the bargaining unit.



42. At the hearing, the applicant agreed that the assistant program manager exercises managerial functions within the meaning of section 1(3)(b), and the Board so finds.

43. The remaining classification in dispute is that of the supervisor. Persons in the supervisor category do not, as counsel for the applicant conceded, fit the model of the professional employee described above. It is clear from the evidence that these persons, none of whom are professional engineers, more closely resemble in their functioning the industrial foreman or unit supervisor. Of the three supervisors examined, one supervises a group of draftsmen, another a group of drawing checkers, mostly leased personnel, and the third a group of mechanical development technicians. These technicians are represented by the United Auto Workers and are covered by a subsisting collective agreement with the company. The three groups in question function in a resource capacity for the various projects.

44. Although the functions performed by the supervisor are, in the area of work assignment and inspection, budget, overtime, etc., narrowly circumscribed by the respondent's organizational structure the evidence reveals a significant role for the supervisor in the area of hiring and firing; the supervisors have either an independent authority or the power to effectively recommend. The evidence makes it clear, moreover, that each of the supervisors perform additional functions of a managerial nature. Oliver negotiates the rate of pay for the approximately fifteen leased personnel under his direction, and negotiates the starting salaries for permanent employees; Wilson makes effective recommendations as to whether employees should receive wage increases or promotions; and Mee is described as "foreman" in the U.A.W. collective agreement and, as such, represents the first stage in the grievance procedure. Mee has personally been the subject of grievances, has given evidence on behalf of management at arbitration hearings and has attended several second-stage grievance meetings. Apart from those employees whose salaries are established by collective agreement, the evidence is that the supervisors are aware of the salaries of the employees in their groups and have access to personnel files.

45. Despite the fact that the duties and responsibilities of the supervisor are in certain areas narrowly circumscribed, it is our opinion, largely because of the authority they exercise in relation to the employees under them, that they exercise managerial functions within the meaning of section 1(3)(b). They are therefore not employees for purposes of the Act and are excluded from the bargaining unit.

46. For the foregoing reasons, the Board finds that all employees of the respondent employed in the municipality of Metropolitan Toronto as professional engineers, engineers, engineers-in-training, scientists and allied technical employees, save and except employees reporting directly to vice-presidents; supervisors, managers and assistant program managers, and those above the rank of supervisor, manager, and assistant program manager, persons covered by the collective agreement between U.A.W. Local 673 and Local 112 and the respondent, persons employed in the personnel and employee relations, finance, marketing and contracts, pricing and program analysis departments, persons regularly employed for not more than twenty-four hours per week, and students employed during the school or university vacation or on work term assignment, constitute a unit of employees appropriate for collective bargaining.

47. A final certificate will now issue.

48. The Board wishes to express its appreciation to counsel for their excellent briefs which were very helpful in disposing of this complicated and difficult matter.

#### **DECISION OF BOARD MEMBER R. W. REDFORD:**

1. The analysis of the organization of Spar Aerospace suggests that it is very similar to a university organization. The majority of the Board at paragraph 20 of its decision makes reference to the "informal control, within the framework of a team". Simply because the Spar system seems to work effectively does not lead to the conclusion that the system is anything but results oriented where deadlines are set as tightly as possible and where great stress is placed on the area of costs. The fact that overtime must be authorized at a very high level is an indication of the strict control placed upon the operating situation. In my opinion, the industrial situation at Spar Aerospace cannot be compared in this instance to a university organization. I am of the view that the similarity between a university organization and the situation at Spar Aerospace ends after noting that both the university and Spar Aerospace employ highly skilled, highly educated employees.

2. In light of this interpretation, the collegial relationship pales when compared with the industrial framework within which the employees of Spar Aerospace work. While it may be true that the Spar groups work effectively with one another, and that a professional's area of expertise is respected, the fact remains that the operating system is tightly managed and tightly controlled.

3. With respect, I also disagree with the majority in its conclusion in paragraph 18 of the decision "that there is not in the professional setting existing here the same potential for a 'conflict of interest' as might arise if, for example, the frontline supervisor in an industrial operation were included in a bargaining unit with persons they supervise". Surely the principle of excluding supervisory staff from bargaining units is appropriate to any work setting, to any bargaining group, despite their history of co-operation and notwithstanding their level of sophistication. To suggest otherwise jeopardizes, in my view, the future bargaining/supervisory relationship irreparably. Bargaining units must be set up based upon the principle of the separation of management and supervisory groups from the bargaining unit in *every* case.

4. In my view, the project manager does have significant managerial authority over an area which is a highly sensitive one in terms of the employment relationship at Spar Aerospace; that is, he has responsibility over the deployment of personnel. In addition, the project managers supply significant data to the performance review system. These functions are not similar to the functions exercised in a university situation by departmental chairmen. As I have indicated, the university situation is one that is vastly different from the industrial setting as Spar. At Spar, where costs are closely controlled, where results are demanded, and schedules are tightly planned, the deployment of personnel is a totally different activity than would be the case with the assignment of work at a university.

5. Performance evaluation and the deployment of personnel are, in my opinion, two of the most sensitive issues in the day-to-day relationship between employees and management. To suggest that a project manager could be part of the bargaining unit, and at the same time carry out these functions, does not recognize this reality. In addition, I would note that both project managers felt that they had a significant voice in any decision relating

to discharge. Both project managers assumed that they had authority to take some disciplinary action. It must be stressed that simply because they have not had, to date, need to exercise this authority, does not suggest that this authority does not exist in the project manager. This is particularly important in a group that is in the process of moving from a non-union environment to one where there will be a bargaining unit represented by a trade union.

6. In summary, it is my view that it is inappropriate for the majority to rely on the university setting in order to determine whether or not the persons in question are employees for purposes of *The Labour Relations Act*. This case must be considered on its own facts as an industrial situation, albeit one where the incidence of conflict has not been seen to date. While I agree with the majority in excluding the supervisor, the section chief – resource, the manager and assistant program managers, I would have also excluded the project managers from the bargaining unit.

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**1910-78-U Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant), v. Superior Glove Works Limited (Respondent).**

**Discharge for Union Activity – Section 79 – Anti-union and mus admitted – compelling economic evidence adduced supporting employer’s explanation of lay-off – union organizers not laid off – application dismissed**

**BEFORE:** Arthur Haladner, Vice-Chairman and Board Members C. A. Ballentine and C. G. Bourne

**APPEARANCES:** *J. McNamee and W. Rannachan for the complainant; W. G. Phelps, Paula Rusak and F. Geng for the respondent.*

**DECISION OF ARTHUR HALADNER, VICE CHAIRMAN AND BOARD MEMBER C. G. BOURNE; July 9, 1979**

1. This is a complaint brought under section 79 of *The Labour Relations Act* respecting certain lay offs which took place in early February of 1979. At that time, the respondent discontinued production of a new line of heavy gloves and laid off the approximately fourteen employees hired to produce it. The complainant alleges that the lay offs were taken in response to its organizing campaign, which was then in progress and, as such, are in violation of section 56 and section 58(a) of the Act.

2. There can be no doubt – indeed it was acknowledged by counsel in his opening statement – that the respondent does not wish to operate with a union. The evidence indicates that Frank Geng, the respondent’s owner and general manager made, in the period immediately preceding the lay offs, no secret of his opposition to the complainant. This opposition manifested itself in interviews with employees regarding their union affiliation as well as statements to the effect that unionization might result in lay offs – in the event that



costs were pushed up. It is not surprising, therefore, that when lay offs occurred, they were regarded by employees with suspicion, and that this complaint was brought. The Board is not, however, concerned in this proceeding with employee perceptions – at least not directly. What we are directly concerned with is the motivation of the respondent. The question we must decide is whether the decision to lay off was motivated by the complainant's organizational activity. If it was, either in whole or in part, then the lay offs are an unfair labour practice in violation of the Act.

3. The onus in cases such as this one is upon the employer to come forward with an explanation for its conduct from which it can reasonably be inferred that the actions complained of were not motivated by anti-union considerations. Here, the respondent led evidence through Mr. Geng that the decision to lay off was motivated by a number of economic considerations, the cumulative effect of which was to make continued production economically unfeasible. Mr. Geng's evidence was explicit and precise, and was in no respect discredited under cross-examination. Further, his evidence as to the reasons for the lay offs was corroborated by his partner, Lamont Jackson, as well as by the respondent's bank manager whose call to Mr. Geng, on January 24th, was a culminating factor in the decision to lay off. When the company's evidence is examined in its totality, there can be no doubt that the lay offs can be justified on economic grounds.

4. Counsel for the complainant contends, however, that even if that is so, and he could not say that it is not – the effect of the lay offs was to “chill” its organizing drive. Counsel asks the Board to draw the inference that this result was intended, and that it was a factor in the decision to lay off.

5. The Board in a number of cases has found that a course of conduct, although justifiable on business grounds, was nevertheless tainted by an anti-union motive. Weighing against such a conclusion in this case, however, are a number of evidential considerations. Apart from the fact that the lay offs were so clearly warranted on business grounds, there is the fact that none of the union organizers, all of whom were known to the respondent, were laid off – or in any way made the subject of employer reprisals. This, despite Mr. Geng's admittedly strong feeling towards them. At the hearing Mr. Geng acknowledged that he felt disappointed and betrayed by the efforts of some of his more senior employees to organize a union and that he had expressed his feelings. However, as stated, none of these more senior employees were laid off or discriminated against. Of the fourteen employees laid off, all were very junior people having been hired as trainees to work on the new line – some as little twenty days before. Mr. Geng gave evidence that he was unaware of whether these employees were union organizers or supporters, and no evidence was offered to contradict him.

6. But counsel contends that the lay offs, even if not taken as a punitive measure – against the employees laid off – were intended as a signal to other employees as to what might happen to them if the union was successful. This contention, while not beyond the realm of possibility, does not square with the evidence before us. The respondent's conduct in the period in question was by no means subtle, and we must agree with the contention of its counsel that if the respondent intended to make an example by the lay offs, it likely would have made its meaning plain.

7. Another consideration weighing against counsel's contention of a “chilling purpose” is the absence in this case of any evidence from which knowledge – prior to the deci-

sion to lay off – can be imputed to the employer. Mr. Geng gave evidence, also uncontradicted, that he did not become aware of the organizational efforts of the complainant until January 30th – after the decision to lay off had been made and after the respondent's foreman had been instructed to commence the lay off procedure. If this evidence were untrue, it could certainly have been contradicted. It is noteworthy that the interviews of employees as to their union affiliation followed almost immediately the time at which the respondent concedes knowledge.

8. Finally, it should be emphasized that this is not a case of a company discontinuing production of a long established part of its business – the situation in *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, where the employer's closure of its telephone answering service was found by the Board to have been motivated by anti-union considerations. The operation discontinued here had been in existence for a short time only – having been instituted on an experimental basis in response to difficult and unusual market conditions. As stated, the laid off employees were all trainees

9. Our conclusion, having regard to these considerations, together with the Board's assessment of the credibility of the witnesses, is that the lay offs were for reasons totally unrelated to the presence of the union at Superior Glove and that, but for the complainant's organizational efforts, the lay offs would have occurred and at the same time. That being the case, it cannot be found that the lay offs were contrary to the Act. This complaint is therefore dismissed.

10. It should be emphasized that the Board has made in this decision no finding as to whether the respondent's conduct in the period preceding the lay offs constitutes a violation of the Act. Nor have we expressed any opinion as to the effect of such conduct upon employee desires or free wishes. Although this conduct was referred to in the complainant's particulars and has been considered by the Board – as evidence of the respondent's anti-union animus and modus operandi – it was not made the subject of a specific complaint or application. Accordingly, we do not consider it appropriate for purposes of this decision to make any findings or express any opinions in these regards.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE:**

1. I am unable to concur in the decision of the majority in the instant case. In my respectful opinion, their decision is wrong in relation to the Board's jurisprudence and does not provide a remedy for those employees whose rights have been clearly violated by the respondent.

2. In support of the complaint brought under section 79 of *The Labour Relations Act*, the applicant alleged that the respondent employer acted contrary to sections 56 and 58(a) of the Act in order to chill the applicant's organizing campaign. The applicant established by clear evidence that the respondent's part owner and general manager, Frank Geng, was vehemently opposed to the union, that he attempted to intimidate and coerce certain of its employees and that he implied should the union campaign continue future lay-offs may take place. In fact, the respondent's general manager admitted that he knew who the union supporters were, that he took each suspected member (all women) into his office, individually behind a *locked door*, and suggested future lay-offs if the union was to succeed. The respondent in relation to the lay-off gave evidence that it was his original plan to lay off

gradually by a weeding out process, but when he became aware of the union organizing campaign he laid off en masse.

3. On the evidence before us I would have found as a fact that the termination of the grievors was motivated in part in order to thwart the the union organizing campaign, and that the evidence of the respondent relating to economic reasons for the *sudden* lay-off is self-serving and is an attempt to camouflage the real purpose of the lay-off.

4. It is not sufficient in this case for the respondent to establish, as the majority seems to hold, that "... the lay off can be justified on economic grounds ...". The onus falls on the employer to prove on the balance of probabilities that it did not contravene the Act. In discharging the onus the respondent must prove that the economic reasons it advances are the *only* reasons for lay-offs. As the Board in the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 stated at page 749:

"Given the requirements that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons, and second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

5. In my view the application of the Board's normal tests would, in the circumstances of this case, lead to the irresistible conclusion that the employer had failed to prove it had no anti-union motive for the lay-off. As the Board put the matter in *The Ontario Educational Communications Authority* case, [1976] OLRB Rep. Nov. 721 at page 724:

"The Board in assessing the employer's explanation, must look to all the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, the employment history of the grievor and his involvement in trade union activity, unusual or atypical conduct of the employer following upon knowledge of trade union activity, the timing of the termination or other alleged unlawful activity vis-a-vis the employer's knowledge of trade union organization and of course the credibility of the witnesses. (See *National Automatic Vending Co. Ltd.* case, 63 CLLC ¶16, 278.)"

In the instant case the employer has conceded his knowledge, his anti-union activity preceding the lay-offs and his suggestions to the employees he interviewed that there might be further lay-offs. Does it lie in the mouth of that employer to say he had no anti-union thoughts in mind when he carried through the lay-off en masse and chilled the applicant's organizing campaign? I think not.

6. The evidence offered by the employer related to economic reasons for the lay off is evidence that lies entirely within the control and knowledge of the employer. Accordingly, while it may not be suspect on that ground alone, it cannot properly be given more weight than the objective circumstances of the lay off in the shadow of an organizing campaign and following hard on the heels of the anti-union activities admitted by the employer.



As the Board stated in *The Ontario Educational Communications Authority* case, *supra*, at page 725:

“Similarly, the Board cannot allow a legitimate reason to mask an anti-union motive. The Board has long held that anti-union motive does not have to be the sole reason or even the predominant reason underlying the activity complained of for the Board to find that the Act has been violated. This approach has received judicial approval in *Bushnell* (1974), 1 OR (2d) 442, affirmed (1975), 4 OR (2d) 288. Accordingly, the Board must be prepared to examine all of the evidence, circumstantial and otherwise, for the purpose of drawing inferences as to the credibility of the explanation put forward by the employer and in so doing it must not be swayed by either the coexistence of unfair treatment or by the coexistence of legitimate reasons for the employer’s conduct. (See *Pop Shoppe (Toronto) Ltd.*, [1976] OLRB Rep. June 299.)”

7. Accordingly, even conceding for the sake of argument that the evidence before us is sufficient to find as the majority holds in paragraph 9, that the lay offs would have occurred at the same time in the absence of the union organizing campaign, a holding from which I wish to disassociate myself, it cannot be said, in the circumstances of this case, that the employer harboured no anti-union motive when he laid off the grievors. That being the case, the respondent has failed to discharge the onus it bears and the applicant must therefore succeed. In regard to paragraph 2 of the majority decision which concedes the anti-union animus of the respondent, the very least that the Board should do is direct the employer to recall the laid off employees in preference to any new employees, as economic circumstances require. This is the remedy I would have found as a minimum.

8. I also wish to indicate the protection afforded witnesses under section 71(1):

“No employer, employer’s organization or person acting on behalf of an employer or employer’s organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.”

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**0378-79-U; 0379-79-U** The Amalgamated Jewelry and Allied Trades Workers' Union, Local 33, I.J.W.U., C.L.C., A.F.L.-C.I.O., (Complainant), v. **The Toronto Jewellery Manufacturers' Association**, Excelsior-Heinz Limited, Excellent Jewellery Company Limited, S. Fremes & Co. Ltd., Gunning Brothers Limited, George R. Mitchell & Co., Myerson Limited, Nathan Hennick & Co. Ltd., Harry Walker Jewellery Manufacturing Company Limited, Christenson Ltd., Charles Jewellery Company Ltd., Jack W. Gunning, Peter Heinz, Lou Bain, and Daniel Myerson, (Respondents).

**Collective Agreement – Duty to Bargain in Good Faith – Union rejecting final offer and striking – final offer not formally withdrawn – Union subsequently accepting final offer – whether collective agreement – whether employer bargaining in bad faith by refusing to sign agreement**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and C. Balentine.

**APPEARANCES:** *S. B. D. Wahl and I. Chase for the complainant; James T. Heather and M. O'Toole for the respondents.*

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER H. J. F. ADE; July 23, 1979**

1. These are two complaints filed under section 79 of *The Labour Relations Act*. Each was filed May 28, 1979 and came on for hearing on June 19, 1979. The proceedings in the two files are hereby consolidated. The complainant has alleged that the respondents have violated section 14 of the Act and thereby have committed an offence within the meaning of section 85 of the Act. Thus the complainant is seeking the Board's consent to institute a prosecution of the respondents in addition to the specific relief being sought in respect of the section 14 complaint which alleges that the respondents have failed to bargain in good faith within the meaning of that section.

2. The parties are agreed as to the facts in this case but are at issue over the conclusions to be properly drawn therefrom. The complainant and the respondent association ("the Association") were parties to a collective agreement ("the Agreement") which expired June 30, 1978. Bargaining between them commenced following the serving of notice by the complainant on March 28, 1978, and proceeded through its customary stages until, following the issuing by the Minister of Labour on February 23, 1979, of a "no board" report, the parties were in a position to apply lawfully the economic sanctions of a lockout or stike. The complainant began strike action against individual employers on April 6th and by April 14th it was on strike against six of the ten employers which had been bound to the Agreement. While the complainant admits that the bargaining conduct of the respondents prior to the strike was not in bad faith, it is relying on certain agreed facts of events both prior to and after the strike to support its allegation that their conduct beginning during the strike and continuing to the filing of these applications was conduct in violation of section 14 of the Act.

3. The Association made an offer for renewal of the Agreement for a two-year term

at a bargaining meeting on January 30, 1979, which the complainant rejected by means of a counter-proposal. The Association reduced its offer to writing in a letter dated February 12, 1979. The offer contains proposals dealing with union security, the "apprentice" clause, contributions to the welfare fund and the pension plan and a wage proposal. The offer has not been altered, withdrawn or denied by the Association at any time up to the filing of these complaints. The Association further notified the complainant by letter dated March 30th that it was making no additional proposals. This letter was written in response to one from the complainant advising the Association that the complainant was authorized to call a strike and requesting a new proposal from the Association. The strike ensued and eventually on April 30th a meeting took place of Jack Gunning, Peter Heinz, and Case Gies. Gunning and Heinz are members of the Association and Gies is an elected official of the complainant and administrator of the jointly trustee welfare and pension funds of the complainant and the Association. These persons agreed that the complainant should reconsider the last offer. There is no evidence before the Board which either establishes or supports an inference that Gunning and Heinz were empowered to commit the Association in collective bargaining to commit it to the agreement. It is clear that Gies was not authorized to commit the complainant. In the circumstances the Board is not prepared to conclude that this meeting resulted in any re-commitment of the Association to its offer made January 30th and outlined in writing in the February 12th letter ("the last offer"). Nonetheless, on May 2nd the complainant's membership voted to accept the last offer and that same day the president of the complainant telephoned Gunning to inform him of this situation. Counsel for the complainant notified the Association of this acceptance by letter dated May 8th and reiterated the notice in another letter dated May 16th. The Association has not replied to either letter. The full texts of both letters are recited below:

*"May 8, 1979*

We are the solicitors for the Amalgamated Jewelry and Allied Trades Workers' Union, Local 33 ("the Union").

As you have been advised, the Union, at a membership meeting on Wednesday, May 2nd, 1979, accepted and ratified the last proposals of the Association for the renewal of the Collective Agreement, contained in a letter dated February 12th, 1979 from Mr. James T. Heather, on behalf of the Association, to Mr. I. Chase, President of the Union. Thereafter, we have been informed by Mr. Heather that he is no longer able to speak on behalf of the Association with respect to this matter. Consequently, we are writing to you to request the execution, without delay, of a renewal agreement in accordance with the last offer of the Association, as accepted and ratified by the membership of the Union on May 2nd, 1979.

In the event that you refuse to comply with this request to execute a collective agreement in accordance with the accepted offer, the Union will have no alternative but to consider instituting proceedings before the Ontario Labour Relations Board.

We request your immediate attention to this matter and await your reply."



*"May 16, 1979*

We have received no reply to our letter dated May 8th, 1979.

Again, we reiterate that the Union has accepted and ratified the last contract offer of the Association for the renewal of the Collective Agreement as outlined in the letter dated February 12th, 1979 from Mr. James T. Heather on behalf of the Association to Mr. I. Chase, President of the Union. Again, we request the immediate execution of a renewal agreement in accordance with the last offer of the Association as accepted and ratified by the Union.

In the event that we receive no response to this letter within twenty-four hours of the date hereof, on behalf of the Applicant, we shall commence proceedings before the Ontario Labour Relations Board."

4. The complainant contends that the Association's signed offer (its letter dated February 12, 1979) together with the complainant's unequivocal acceptance of the offer contained in its letters of May 8th and May 16th are documents which constitute a collective agreement within the meaning of section 1(1)(e) of the Act. Or, should the Board find that these documents, in the circumstances of this case, do not satisfy its criteria for a collective agreement, the complainant submits that they are an agreement which forms the basis from which a renewed collective agreement between the parties can be drafted and executed. The complainant further contends that the Association's violation of section 14 lies in its refusal to acknowledge that a collective agreement has been reached or, in the alternative, in its refusal to execute a renewed collective agreement on the basis of the terms of settlement contained in the three letters.

5. Section 14 of the Act creates an obligation on the parties to collective bargaining to "bargain in good faith and make every reasonable effort to make a collective agreement", but this is not an obligation to reach a collective agreement. When, however, the collective bargaining process results in a collective agreement, the end point of the process has been reached for all practical purposes for the duration of that agreement and, absent compelling evidence to the contrary, the section 14 obligation would be satisfied. In the instant case, were the Board to find that there was a collective agreement as submitted by the complainant, there are no circumstances which would cause the Board to find that the respondents had not satisfied their section 14 obligation. The Board, therefore, will deal first with the complainant's argument that a collective agreement has been reached.

6. It is well settled in the Board's jurisprudence that a collective agreement within the meaning of section 1(1)(e) of the Act is not limited to being a single document formally executed, but may by proper reference incorporate a number of documents. What the Board does require is signed evidence of the agreement of the parties. Therefore, the question the Board must ask itself in the instant case is whether the three letters above referred are, in the circumstances of this case, signed evidence of the agreement of the parties. In order to answer that question, it is necessary for the Board to examine the collective bargaining process which produced the documents.

7. It is clear from the facts in this case that the complainant, having been unable to

use whatever bargaining power it possessed at the time to obtain a satisfactory proposal from the Association for settlement of negotiations, took the ultimate recourse of resorting to the economic sanction of a strike in an attempt to obtain bargaining objectives which it must have seen to be in its best interest. This action was taken some two months after the Association made its last offer. Albeit, the action was not taken until one last effort was made to gain a further offer from the Association. A little more than three weeks after it began the action, the complainant sought and obtained from its members acceptance of the Association's last offer. The question is, within the collective bargaining context, was the offer still there for the complainant to accept.

8. Collective bargaining is a dynamic process and it is also one to which the parties apply their relative bargaining strengths in an attempt to gain from each other concessions and compromises which eventually produce a collective agreement. There is an implied expectation in the give and take of collective bargaining that concession and compromise will result in agreement without the exercise of economic sanction. In fact, it is not uncommon for either party to make this an explicit condition attached to tentative agreement on any or all items so that, if there is either a lockout or strike, all issues are "back on the table". There is no evidence in our case that such a condition was attached to the Association's last offer and the evidence is that it did not subsequently withdraw its offer. The Board, therefore, must consider what effect, if any, the passage of time and the intervening events have had on the status of the offer.

9. In *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65, the Board commented as follows about the collective bargaining process:

"Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining and in our view, is applicable in the instant case."

The Board found, in all the circumstances of that case, that the conduct of the employer following a lockout of withdrawing from tentative agreement on one of the major issues between the parties was not a breach of the section 14 obligation. The Board concluded that the employer's action might be tough bargaining but was not a violation of the Act. In so doing, the Board was recognizing that one of the realities of the bargaining process is that intervening events may be legitimate cause for the parties to alter their positions.

10. The question in the instant case is whether, absent a formal withdrawal of the Association's last offer, the passage of time and the intervening event of the strike have extinguished the last offer. The complainant rejected it in the first instance by making a counter-proposal. Whatever the Association's reasons were for writing its letter of February 12th setting out the offer in writing, it is reasonable to conclude that the offer was still open

at the time. The complainant, after determining that no further proposal was forthcoming, then resorted to the ultimate form of rejection by embarking on a strike. Is it entitled to expect, after being on strike for up to three weeks, that the offer is still there for the taking? It would seem from the Association's silence that it thinks not, however, that is a matter for the Board to determine. Having regard to the Board's comments in *Pine Ridge, supra*, about the collective bargaining process, it would be naive in the extreme for parties to collective bargaining to expect that conditions which prevailed before a strike or lockout to still prevail afterward. That is not to say that both parties might not see it to be in their best interests to agree to pick up bargaining where they left off before a strike or lockout; rather it is to say that neither party is entitled to rely on that being the situation. The Board's jurisprudence on section 14 complaints recognizes this reality when it is dealing with the refusal of one party to resume bargaining during or following a strike or lockout. One of the factors the Board takes into account is whether the party requesting that bargaining be resumed has indicated that it is prepared to make significant concessions from its position prior to the onset of economic sanction. In the absence of such an indication, the Board usually will not find a refusal to resume bargaining to be a section 14 violation. The evidence in this case establishes that the complainant, by going on strike, has taken its best shot at the Association to try and get an improved settlement offer. It has failed and is now trying to salvage the terms which were available before the strike.

11. Having regard for all of the foregoing, the Board finds that the last offer has been extinguished by the passage of time and the intervening event of the strike between February 12, 1979, when the Association issued the letter containing its last offer and May 2, 1979, when the complainant first attempted to advise the Association that the complainant's members had accepted the offer. Furthermore, in all the circumstances of this case, the Board believes that it would not be in the best interests of constructive collective bargaining to permit the complainant to resurrect the offer by means of its letters of May 8th and May 16th. In the result, those two documents together with the Association's letter of February 12, 1979 do not constitute a collective agreement within the meaning of the Act. Thus the parties have not concluded a collective agreement and the Board must now address itself to the conduct of the respondents which the complainant alleges violates section 14, i.e. the refusal of the Association to execute a renewed collective agreement as sought in the complainant's letters of May 8th and May 16th.

12. The complainant's allegation is founded in its alternate contention that the three letters constitute terms of settlement which form the basis for drafting and executing a renewed collective agreement. It is abundantly clear from the complainant's letters that it is seeking one thing only, a collective agreement based on its acceptance of the Association's last offer. It is not seeking resumption of collective bargaining because it sees bargaining as being completed except for the formalization of the results in a collective agreement. In view of the Board's finding that the Association's offer has been extinguished and thus could not be part of documentation forming a collective agreement, it follows that it cannot be the basis, either, of the settlement claimed by the complainant. In these circumstances, the Board finds that the conduct of the Association does not constitute a failure to meet its obligation under section 14 to bargain in good faith and make every reasonable effort to make a collective agreement.

13. Had either of the complainant's letters of May 8th and May 16th contained a request to resume negotiations and in the same circumstances the request was rejected explicitly or implicitly the result well might have been different.



14. At the outset of the hearing, counsel for the respondents asked the Board to amend the style of cause of the complaint to name only the Association as respondent because it was the sole and exclusive bargaining agent for the named employers. Since the conduct of the hearing would not be affected by the decision, the Board asked the parties to submit argument in the natural course of the proceedings. In view of the result of the proceedings, it is unnecessary for the Board to determine that issue.

15. These complaints are hereby dismissed.

#### **DECISION OF BOARD MEMBER C. BALLENTINE:**

1. I must dissent from the conclusions reached by the majority in the instant case on several grounds.

2. While I concur with the holding in paragraph 5 of the majority decision that section 14 of the Act, standing by itself, does not set up an obligation to reach a collective agreement, I think that where the parties make every reasonable effort to reach a collective agreement and where those efforts result in full agreement on all issues between the parties, the parties are then obliged to execute that agreement. (See *Municipality of Casmir, Jennings & Appelby* [1978] OLRB Rep. June 507). In my view those are the circumstances in the instant case.

3. The evidence before us is contained in an agreed statement of fact submitted by counsel. These facts include, *inter alia*, that the Association made a final offer to the union in writing on February 12, 1979; that on March 15, 1979, the union membership rejected that offer; that by letter dated March 30, 1979, the Association informed the union that there would be no new offer; that on April 14, 1979, the union called a strike against the employers represented by the Association; that on April 30, two members of the Association, Messrs. Gunning and Heinz, suggested to an officer of the union, Mr. Gies, that the union reconsider the last Association offer; and that on May 1, Mr. Gies informed Messrs. Gunning and Heinz that the Executive Board of the union was meeting to reconsider the offer. It was agreed before us that at no time up to the point of the hearing did the Association withdraw its offer. It is also agreed that the union voted to accept that offer on May 2, 1979 and that it informed the Association of this fact by letter of May 8, 1979 and again by letter on May 16, 1979.

4. In my opinion the facts before us are sufficient to sustain a finding that a contract was formed, that is there was an offer and an acceptance of that offer. If the Association had made its offer intending to refuse to recognize an agreement should the offer be accepted by the union, the Association would be, in my opinion, *prima facie* bargaining in bad faith. If the Association, on the other hand, was in any doubt as to whether the union was in fact accepting the Association's offer of February 12, 1979 without qualification, the Association, by failing to make any inquiries in that regard or to clarify its position when it knew or ought to have known that the union was purporting to accept that offer, is in breach of the second branch of its duty under section 14 in that it *prima facie* has failed to make every reasonable effort to reach a collective agreement.

5. In my opinion, based upon the facts before us and in particular based upon the concession by the Association that it never withdrew its offer, the offer had not been extin-

guished by the passage of time. The lapse of time between February 12, 1979 and May 2, 1979, notwithstanding the union rejection and subsequent strike, is not sufficient to extinguish an offer which had never been formally withdrawn and which therefore still remains on the table. The letter of March 30, 1979 from the Association implied that the original offer remained outstanding by stating that no new offer was forthcoming.

6. Even if I am wrong in that view of the inference to be drawn as to the status of the Association offer from the objective facts and the shortness of time between March 30, and May 2, I rely on the representations that passed between the parties on April 30 and May 1 to find that the Association bargained in bad faith. While Messrs. Gunning and Heinz may not have been official spokesmen for the Association for the purpose of binding the Association to a collective agreement, they are in any event agents of the Association for some purposes. Similarly, while Mr. Gies may not have been an official spokesman for the union, he too is an agent for some purposes. Messrs. Gunning and Heinz knew that the union was going to consider the last Association offer. That being the case, the Association cannot now come to this Board and argue that its final offer of February 12th had lapsed prior to the union accepting that offer. Accordingly, I find that the Association bargained in bad faith in that it did not advise the union that the offer was withdrawn prior to the union's acceptance. While I can appreciate that the tone of the letters from the union may have been offensive to the Association, nevertheless I would find that the Association was under a duty pursuant to section 14 of the Act to respond to those letters from the union.

7. Since the representations made by the respondent at the hearing leave the Board with some uncertainty as to the precise terms of the agreement, I concur with my colleagues in finding that the evidence is insufficient to find a collective agreement now exists. On the other hand, the evidence suggests that the parties have reached an understanding as to the nature of the agreement. The failure of the Association to now clarify its position with respect to the actual details of that agreement leads, in my opinion, to the conclusion that the Association has failed to make every reasonable effort to reach a collective agreement.

8. The purpose of the Act is to encourage collective bargaining. Consequently I agree that that purpose would not be well served by granting the union consent to prosecute. By the same token, that purpose would be best served by ordering these parties back to the bargaining table to resolve any differences which may exist between them as to the actual terms of the collective agreement based upon the acceptance by the union of the Association's last offer. Hence, I would order both parties to meet and make every reasonable effort to reach a collective agreement.

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**2040-78-R** Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union, (Applicant), v. **Tip Top Tailors**, (Respondent), v. Group of Employees, (Objectors).

**Appropriateness – Bargaining Unit – Certification – Part-timers never employed at location subject to application – history of part-timers employed at other locations – whether part-timers excluded from bargaining unit**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and F. W. Murray.

**APPEARANCES:** *S. M. Grant and Bob Andrews for the applicant; E. L. Stringer, Q. C., E. Lazarotto and J. Pajunen for the respondent.*

**DECISION OF THE BOARD;** July 26, 1979

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The parties have agreed to a bargaining unit of tailors employed by the respondent at its central tailoring shop in Metropolitan Toronto. These tailors do alterations on clothing purchased from the respondent's various retail stores. The parties are not in agreement on the question of whether part-time employees should be excluded from the bargaining unit. Until about November of 1978 all of the respondent's tailors were employed in its retail stores. However, at about that time it moved some, but not all, of its tailors out of the stores to its central tailoring shop. Although part-timers have been employed in its retail stores, the respondent has not to date employed any part-timers in its central tailoring shop. The respondent is relying on its practice of employing part-timers in its retail stores as the basis for its contention that the Board should exclude part-timers from the central tailoring bargaining unit.
4. The Board will generally not exclude part-time employees from a bargaining unit when no such persons are employed as of the date of the application, unless there has been a practice of employing them at that location which the employer intends to continue. This is true even if the operation is a new one and the employer has a history of employing part-timers at other locations. See: *Dominion Glass Company Limited*, [1970] OLRB Rep. Dec. 935. The Board is not satisfied that the circumstances of this case call for a departure from its general practice in this regard, particularly in light of the fact that no part-timers have been employed in the central tailoring shop since it commenced operations in November of 1978. Accordingly, part-time employees will not be excluded from the bargaining unit.
5. Having regard solely to its general authority under section 6(1) of the Act to determine appropriate bargaining units, the Board finds that all tailors employed by the respondent at its central tailoring shop in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.



6. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 20, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A certificate will issue to the applicant.









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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1979

### BARGAINING AGENTS CERTIFIED DURING JUNE

#### No Vote Conducted

**0475-78-R:** United Steelworkers of America (Applicant) v. Radio Shack (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen and persons above the rank of foreman, office and sales staff." (31 employees in the unit).

Unit #2: "all employees of the respondent in Barrie, save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (133 employees in the unit).

**1894-78-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Sherman Sand & Gravel Limited (Respondent).

Unit: "all dump truck owner operators employed at 7204 Walker's Line, Milton, Ontario, save and except those who operate trailer units." (73 employees in the unit). (*Having regard to the further agreement of the parties*).

**1897-78-R:** Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.C. (Applicant) v. Rock Haven Motels (Peterborough) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Peterborough, Ontario, regularly employed for more than twenty-four (24) hours per week, save and except managers and those above the rank of manager." (23 employees in the unit). (*Having regard to the agreement of the parties*).

**2105-78-R:** Canadian Union of Public Employees (Applicant) v. Participation House – Hamilton & District (Respondent).

Unit #1: "all employees of the respondent employed at Binbrook in its Participation House Corp., save and except supervisors, persons above the rank of supervisor, professional medical staff, registered nurses, physiotherapists, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, students employed under a co-operative training program, and office and clerical staff." (19 employees in the unit). (*Having regard to the agreement of the parties*).

(*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

**0062-79-R:** Canadian Food & Allied Workers, Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Valdi Inc. (trading as Valdi Discount Foods) (Respondent).

Unit: "all employees of the respondent in its stores in Metropolitan Toronto save and except the



Assistant Store Manager and persons above the rank of Assistant Store Manager.” (19 employees in the unit). (*Having regard to the agreement of the parties*).

**0137-79-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Mike’s Supermarket (1962) Limited (Respondent).

Unit: “all office and clerical employees of the respondent’s head office at Timmins, Ontario, save and except confidential secretary, head cashier training supervisor, maintenance employees, graphic art employees, office manager, persons above the rank of office manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods.” (129 employees in the unit). (*Having regard to the agreement of the parties*).

**0146-79-R:** Labourers’ International Union of North America – Local 1081 (Applicant) v. Van-Sousa Ltd., carrying on business under the firm name and style of C.C.S. Construction (Respondent) v. Group of Employees (Objectors).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of the Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman.” (18 employees in the unit). (*Having regard to the agreement of the parties*).

**0147-79-R:** Teamsters Local Union No. 419, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Ralston Purina Canada Inc. (Respondent) v. International Personnel Ltd. (Intervener #1) v. American Federation of Grain Millers (Intervener #2).

Unit: “all employees of the respondent at 2265 Royal Windsor Drive, Mississauga, save and except foremen, those above the rank of foreman, office and sales staff and those covered by subsisting collective agreements.” (22 employees in the unit).

**0198-79-R:** Ontario Nurses’ Association (Applicant) v. Hyland Crest Senior Citizens’ Home (Respondent).

Unit: “all registered and graduate nurses engaged in a nursing capacity by the respondent at Minden, Ontario, save and except Director of Nursing, persons above the rank of Director of Nursing and persons covered by a subsisting collective agreement between Canadian Union of Public Employees Local 1225 and the respondent.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

**0225-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) Northern Telecom Canada Limited (Respondent) v. United Electrical, Radio and Machine Workers of America (UE) (Intervener) v. Group of Employees (Objectors).

Unit: “all employees of the Respondent at its manufacturing divisions in the Regional Municipality of Peel, save and except section managers, persons above the rank of section manager, registered nurses, professional engineers, and employees covered by subsisting collective agreements between the Respondent and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1535 (technical, office and clerical), between the Respondent and the International Union of Operating Engineers, Local #796 (operating engineers), and employees covered by subsisting collective agreement between the Respondent and the Communication Workers of Canada, Local C9, students employed during the school vacation period and students

employed under a co-operative university program, and members of the personnel department, secretaries to the manufacturing manager or equivalent or higher, and secretaries to managers reporting directly to the manufacturing manager or equivalent and specialists performing functions in purchasing, business systems, auditing, control/accounting, marketing and installation.” (1329 employees in the unit). (*Having regard to the agreement of the parties*).

**0231-79-R:** Canadian Union of Public Employees (Applicant) v. Fairmount Home for the Aged (Respondent).

Unit: “all employees of the respondent in the Township of Kingston in the County of Frontenac, save and except the administrator, director of nursing, office supervisor, maintenance supervisor, housekeeping supervisor, bookkeeper and head cook.” (57 employees in the unit). (*Having regard to the agreement of the parties*).

**0252-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Priene Limited and 377806 Ontario Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0273-79-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. United Steelworkers of America (Social Club) Local 2251 (Respondent).

Unit: “all employees of the respondent employed in its Social Club at Sault Ste. Marie, save and except office staff, bar manager and persons above the rank of bar manager.” (8 employees in the unit).

**0276-79-R:** Service Employees International Union, Local 532 A.F. of L., C.I.O., C.L.C. (Applicant) v. Aged Women’s Home of Hamilton (Respondent).

Unit: “all employees of the respondent in Hamilton, Ontario, save and except supervisor, foremen, persons above the rank of supervisor or foreman, professional nursing staff and office staff.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

**0277-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Ideal Food Service Equipment (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0279-79-R:** Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Rockland (Respondent).

Unit: “all employees of the Town of Rockland, save and except office staff, including the Day Care Centre and Municipal Library, non-working foremen and those above the rank of non-working foreman, employees working twenty-four hours or less per week and students employed during the summer school vacation period.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

**0289-79-R:** Service Employees Union, Local 478, A.F. of L., C.I.O., C.L.C. (Applicant) v. Balmoral Lodge Nursing Home (Respondent).

Unit: "all employees of the respondent at Balmoral Lodge Nursing Home, at Kilworthy, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff." (24 employees in the unit). (*Having regard to the agreement of the parties*).

**0291-79-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Bertrand & Frere Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent employed as Ready-Mix Drivers, Loader Operators, Batchers working at or working out of the Township of Longueil, County of Prescott, save and except foremen, those above the rank of foreman, office and sales staff." (12 employees in the unit).

**0292-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Sinclair Welding Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0315-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Oscar Wiles & Sons Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0316-79-R:** Ready-Mix Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Indusmin Limited (Respondent).

Unit: "all employees of the respondent engaged as owner/operator truck drivers working at or out of Pinecrest Yard, County of York, save and except dispatchers, and persons above the rank of dispatcher, office and sales staff and persons covered by a subsisting collective agreement." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**0318-79-R:** Labourers International Union of North America, Local 183 (Applicant) v. Cavino Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

**0319-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Norland Construction (Respondent).



Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0320-79-R:** Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Corporation of the County of Simcoe, Sunset Manor Home for the Aged (Respondent).

Unit #1: "all registered nurses employed by the Corporation of the County of Simcoe at Sunset Manor, Collingwood, Ontario, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements, and persons regularly employed for not more than twenty-four (24) hours per week." (4 employees in the unit).

Unit #2: "all registered nurses regularly employed for not more than 24 hours per week by the Corporation of the County of Simcoe at Sunset Manor, Collingwood, Ontario, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (3 employees in the unit).

**0321-79-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Jessel Foods Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Timmins, save and except Branch Manager, salesmen, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*).

**0323-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. 258167 Vending Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0328-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Ta-Mari Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**0330-79-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Swan Cleaners Ltd. c.o.b. Swan Dust Control Ltd. (Respondent) v. Employee (Objector).

Unit: "all route-drivers employed by the respondent working at or out of Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (31 employees in the unit). (*Having regard to the agreement of the parties*).

**0340-79-R:** Christian Labour Association of Canada (Applicant) v. Hank Brouwer Construction Ltd. (Respondent).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit). (*Having regard to the foregoing*).

**0345-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. D and J Manufacturing Co. Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0349-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Dalv Construction Ltd. (Respondent).

Unit: “all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0350-79-R:** United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of Fotomat Canada Limited engaged in retail sales in the Town of Ajax, save and except supervisors, and persons above the rank of supervisor.” (2 employees in the unit).

**0352-79-R:** Millwrights’ Local Union 2309 – United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eastern Canada Contractors Limited (Respondent).

Unit: “all millwrights and millwrights’ apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0363-79-R:** Service Employees Union, Local 204 Affiliated with A. F. of L., C.I.O. C.L.C. (Applicant) v. Bestview Services Limited (Respondent).

Unit #1: “all dietary employees of the respondent, employed at Bestview Lodge Nursing Home in Oshawa, Ontario, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements and persons regularly employed for not more than twenty-four (24) hours per week.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all dietary employees of the respondent, regularly employed at Bestview Lodge Nursing Home in Oshawa, Ontario, for not more than twenty-four hours per week save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements.” (7 employees in the unit). (*Having regard to the further agreement of the parties*).

**0364-79-R:** Toronto Typographical Union No. 91 (I.T.U.) (Applicant) v. Howarth & Smith Limited (Respondent).

Unit: “all employees of Howarth & Smith Limited in Metropolitan Toronto employed in computer terminal input and computer printout verification save and except working foremen and persons above the rank of working foreman.” (23 employees in the unit). (*Having regard to the agreement of the parties*).

**0366-79-R:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Planned Ceilings & Partitions Ltd. (Respondent).

Unit: "all painter and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note*)

**0367-79-R:** International Brotherhood of Painters and Allied Trades – Local 1891 (Applicant) v. Parcor Contracting Division of 394838 Ontario Limited (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassageweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*)

**0369-79-R:** Christian Labour Association of Canada (Applicant) v. W. Marchant & Sons Spray Insulation Ltd. (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0370-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Continental Cooling Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0373-79-R:** United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of Fotomat Canada Limited engaged in retail sales in the Town of Caledon, save and except supervisors, and persons above the rank of supervisor." (2 employees in the unit).

**0382-79-R:** Labourers' International Union of North America, Local 1081 (Applicant) v. Ontario Formwork (Central) Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0390-79-R:** Service Employees Union, Local 204 Affiliated with A. F. of L. C.I.O. C.L.C. (Applicant) v. Medi Park Lodges Inc. carrying on business as Grace Abbey Nursing Home (Respondent).

Unit: "all employees of the respondent in Niagara Falls, Ontario, save and except professional medical staff, registered nurses, graduate nurses, physiotherapists, occupational therapist, supervisors, persons above the rank of supervisors, office staff, persons regularly employed for not more than twenty



ty-four hours per week, and students employed during the school vacation period.” (20 employees in the unit) (*Having regard to the agreement of the parties*) (*clarity note*)

**0395-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Pilen Construction of Canada Limited (Respondent).

Unit: “all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassageweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

**0396-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Curran Contractors Limited (Respondent) v. Labourers’ International Union of North America Local 625 & Local 749 (Intervener).

Unit: “all employees of the respondent working in the Counties of Essex and Kent as instrument men, rodmen, chainmen and party chief, save and except field engineer and persons above the rank of field engineer.” (2 employees in the unit).

**0407-70-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Regis Investments Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**0408-79-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Piper Construction Division of Greenore Developments Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0409-79-R:** Canadian Food & Allied Workers Union 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets A Division of Zehrmart Limited (Respondent).

Unit: “all employees of the respondent in its retail stores in Wallaceburg, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during off-school hours and during the school vacation period.” (40 employees in the unit). (*Having regard for the fact that the parties were otherwise agreed on the description of the unit*).

**0410-79-R:** Canadian Union of Public Employees (Applicant) v. The Sudbury Public Library Board (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the City of Sudbury save and except chief librarian, assis-

tant chief librarian, department heads, secretary – administrative assistant, and persons regularly employed for not more than 24 hours per week.” (42 employees in the unit). (*clarity note*)

**0416-79-R:** International Molders & Allied Workers Union (Applicant) v. Scovill Industries Limited, Dritz Division (Respondent).

Unit: “all office and clerical employees of the respondent at St. Mary’s, save and except purchasing manager, persons above the rank of purchasing manager, secretary to the general manager, salespersons, students employed during the school vacation period and persons covered by a subsisting collective agreement.” (11 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*)

**0418-79-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Halo of Canada Lighting Inc. (Respondent).

Unit: “all employees of the respondent working at Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (47 employees in the unit). (*Having regard to the agreement of the parties*).

**0419-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. West York Construction Limited and West York Construction Ltd. (Respondents).

Unit: “all carpenters and carpenters’ apprentices in the employ of West York Construction Limited in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.” (employees in the unit).

**0423-79-R:** Service Employees Union Local 268 (Applicant) v. McKellar General Hospital (Respondent).

Unit: “all employees of McKellar General Hospital, Thunder Bay, in the district of Thunder Bay regularly employed for less than 25 hours per week and students employed during the school vacation period in the classifications listed on Schedule “A” of the full-time collective agreement between Service Employees Union Local 268 and McKellar General Hospital, save and except stationary engineers and other employees included in the certification of the International Union of Operating Engineers, foremen, foreladies, persons above the rank of foreman of lady, watchmen, professional help and persons covered by subsisting collective agreements.” (33 employees in the unit).

**0425-79-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Kafko Manufacturing Limited (Respondent).

Unit: “all employees of Kafko Manufacturing Limited, at its plant in Mississauga, Ontario, save and except foremen, those above the rank of foreman, persons regularly employed for not more than twenty-four hours per week, office and sales staff and students employed during the school vacation period.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

**0426-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Windsor Plastic Products Limited (Respondent).

Unit: “all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four

ty-four hours per week, and students employed during the school vacation period.” (20 employees in the unit) (*Having regard to the agreement of the parties*) (*clarity note*)

**0395-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Pilen Construction of Canada Limited (Respondent).

Unit: “all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassageweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

**0396-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Curran Contractors Limited (Respondent) v. Labourers’ International Union of North America Local 625 & Local 749 (Intervener).

Unit: “all employees of the respondent working in the Counties of Essex and Kent as instrument men, rodmen, chainmen and party chief, save and except field engineer and persons above the rank of field engineer.” (2 employees in the unit).

**0407-70-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Regis Investments Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**0408-79-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Piper Construction Division of Greenore Developments Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville of Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0409-79-R:** Canadian Food & Allied Workers Union 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets A Division of Zehrmart Limited (Respondent).

Unit: “all employees of the respondent in its retail stores in Wallaceburg, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during off-school hours and during the school vacation period.” (40 employees in the unit). (*Having regard for the fact that the parties were otherwise agreed on the description of the unit*).

**0410-79-R:** Canadian Union of Public Employees (Applicant) v. The Sudbury Public Library Board (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the City of Sudbury save and except chief librarian, assis-



tant chief librarian, department heads, secretary – administrative assistant, and persons regularly employed for not more than 24 hours per week.” (42 employees in the unit). *((clarity note))*

**0416-79-R:** International Molders & Allied Workers Union (Applicant) v. Scovill Industries Limited, Dritz Division (Respondent).

Unit: “all office and clerical employees of the respondent at St. Mary’s, save and except purchasing manager, persons above the rank of purchasing manager, secretary to the general manager, salespersons, students employed during the school vacation period and persons covered by a subsisting collective agreement.” (11 employees in the unit). *(Having regard to the agreement of the parties). (clarity note)*

**0418-79-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Halo of Canada Lighting Inc. (Respondent).

Unit: “all employees of the respondent working at Mississauga, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (47 employees in the unit). *(Having regard to the agreement of the parties).*

**0419-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. West York Construction Limited and West York Construction Ltd. (Respondents).

Unit: “all carpenters and carpenters’ apprentices in the employ of West York Construction Limited in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.” (employees in the unit).

**0423-79-R:** Service Employees Union Local 268 (Applicant) v. McKellar General Hospital (Respondent).

Unit: “all employees of McKellar General Hospital, Thunder Bay, in the district of Thunder Bay regularly employed for less than 25 hours per week and students employed during the school vacation period in the classifications listed on Schedule “A” of the full-time collective agreement between Service Employees Union Local 268 and McKellar General Hospital, save and except stationary engineers and other employees included in the certification of the International Union of Operating Engineers, foremen, foreladies, persons above the rank of foreman of lady, watchmen, professional help and persons covered by subsisting collective agreements.” (33 employees in the unit).

**0425-79-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Kafko Manufacturing Limited (Respondent).

Unit: “all employees of Kafko Manufacturing Limited, at its plant in Mississauga, Ontario, save and except foremen, those above the rank of foreman, persons regularly employed for not more than twenty-four hours per week, office and sales staff and students employed during the school vacation period.” (30 employees in the unit). *(Having regard to the agreement of the parties).*

**0426-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Windsor Plastic Products Limited (Respondent).

Unit: “all employees of the respondent in Windsor, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four

hours per week and students employed during the school vacation period.” (88 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*)

**0427-79-R:** Candian Paperworkers Union (Applicant) v. Karl Gutmann Incorporated (Respondent).

Unit: “all employees of the respondent at Cornwall, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, summer students and employees who work less than 24 hours per week.” (19 employees in the unit). (*Having regard to the agreement of the parties*).

**0434-79-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Dantam Investments Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**0436-79-R:** United Steelworkers of America (Applicant) v. Super-Parket Limited (Respondent).

Unit #1: “all employees of the respondent in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the university or school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the City of Windsor regularly employed for not more than twenty-four (24) hours per week and students hired for the school or university vacation period, save and except foremen, persons above the rank of foreman and office and sales staff.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

**0447-79-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Merison Masonry Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Town of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

**0449-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Weldon McEashen Construction Ltd. (Respondent).

Unit: “all employees of the respondent in the County of Lambton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0455-79-R:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada - Local Union 628 (Applicant) v. Eastern Canada Contractors Ltd. (Respondent).

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices, pipe fitters and pipe fitters' apprentices in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (30 employees in the unit).

**0457-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Roxul Company (A Division of Standard Industries Ltd.) (Respondent).

Unit: "all employees of the respondent at its plant at 551 Harrop Drive, Milton, Ontario, save and except foremen, persons above the rank of foreman, watchmen, technical staff, office and sales staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**0462-79-R:** Toronto Typographical Union No. 91 (I.T.U) (Applicant) v. Goldcraft Printers Ltd. (Respondent).

Unit: "all production employees engaged in offset preparatory work, presswork and bindery work at the respondent's premises in Metropolitan Toronto save and except non-working foremen and persons above the rank of non-working foremen." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**0474-79-R:** Labourers' International Union of North America Local 1081 (Applicant) v. Moir Construction Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0480-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Bono General Construction Limited (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassageweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

**0493-79-R:** Bricklayers, Stonemasons & Tilesetters Union, Local No. 2 Ontario, affiliated with The International Union of Bricklayers and Allied Craftsmen (Applicant) v. Elio Evangelista Investments Ltd. (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**0502-79-R:** Chatham Construction Workers Association, Local No. 53 affiliated with Christian Labour Association of Canada (Applicant) v. Ramac Solar Systems (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respon-



dent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

**0505-79-R:** Labourers’ International Union of North America, Local Union 183 (Applicant) v. The Oster Lane Group Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**0506-79-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hyco Store Fixtures, division of H. Cohen Co. Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0507-79-R:** Christian Labour Association of Canada (Applicant) v. V & W Insulation Limited (Respondent).

Unit: “all insulation mechanics and insulation mechanics’ apprentices in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

## Applications Certified Subsequent to Pre-Hearing Vote

**2034-78-R:** Local 1590, International Brotherhood of Electrical Workers (Applicant) v. Bayly Engineering Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed at its plant at 167 Hunt Street, Ajax, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period.” (118 employees in the unit).

Number of names of persons on revised voters’ list	118
Number of persons who cast ballots	108
Number of ballots marked in favour of the applicant	56
Number of ballots marked against the applicant	52

**0188-79-R:** Retail Clerks International Association, CLC, AFL – CIO (Applicant) v. Hollandia Bakeries Limited (Respondent) v. United Bakery Workers Association Local No. 58 affiliated with the Christian Labour Association of Canada (Intervener).

Unit: “all employees of the respondent at Mount Brydges, save and except foremen, persons above the rank of foreman, driver salesmen, office staff, persons regularly employed for not more than

twenty-four (24) hours per week and students employed during the school vacation period.” (39 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		36
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant	26	
Number of ballots marked in favour of intervener	7	

**0213-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Sparton of Canada Limited (Respondent) v. National Council of Canadian Labour, Local 212 (Intervener).

Unit: “all employees of the respondent in its premises at London, Ontario, save and except foremen, those above the rank of foreman, office employees, draftsmen and the staff of the Engineering Department.” (153 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		86
Number of persons who cast ballots	81	
Number of ballots marked in favour of applicant	57	
Number of ballots marked in favour of intervener	24	

### Applications Certified Subsequent to Post-Hearing Vote

**1786-78-R:** Canadian Food and Allied Workers Union Local 725 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Peoples, Division of St. Michael Shops of Canada Limited (Respondent).

Unit: “all employees of the respondent at Hearst, Ontario, save and except the assistant manager, management trainees, one secretary to the manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (23 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	17	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	5	

**2105-78-R:** Canadian Union of Public Employees (Applicant) v. Participation House – Hamilton & District (Respondent).

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, at Binbrook in its Participation House Corporation, save and except supervisors, persons above the rank of supervisor, and students working under a special grant from a governmental programme.” (24 employees in the unit).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	15	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	4	

*(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).*

**0165-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the Respondent at 950 Lawrence Avenue West in the City of North York in the Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (47 employees in the unit).

Number of names of persons on list as originally prepared by employer		45
Number of persons who cast ballots	34	
Ballots segregated and not counted	2	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	30	
Number of ballots marked against applicant	1	

**0167-79-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Perfect Pen and Stationery Co., Division of Cadence Mail Order of Canada Ltd. (Respondent).

Unit: "all employees of the respondent working at Scarborough, Ontario, save and except operations manager, persons above the rank of operations manager, office and sales staff, persons regularly employed for not more than twenty-four hours per per week and students employed during the school vacation period." (4 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	1	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0703-78-R:** Brewery, Soft Drink, Distillery, Distributors, and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant #1) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant #2) v. Erie & Huron Beverages Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent working at or out of Chatham, Ontario, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (35 employees in the unit).



Unit #2: "all employees of the respondent regularly employed at or out of Chatham, Ontario for not more than 24 hours per week and students employed during the school vacation period save and except foremen, persons above the rank of foreman and office staff." (3 employees in the unit).

**2028-78-R:** The Hotel & Club Employees, Union Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.L.C.-C.I.C.) (Applicant) v. The Bristol Place Hotel (Respondent). (319 employees).

**2162-78-R:** International Ladies' Garment Workers' Union (Applicant) v. Modes Bilboquet (Canada) Ltd. (Respondent). (33 employees).

**0065-79-R:** Comco Employees Association (Applicant) v. Comco Metal & Plastic Industries Ltd. (Respondent). (76 employees).

**0232-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Canadian Curtis Refrigeration Limited (Respondent). (2 employees).

**0329-79-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Wheels Inn Ltd. (Respondent). (259 employees).

**0339-79-R:** Trent Metals Employees Association (Applicant) v. Trent Metals Limited (Respondent). (54 employees).

**0397-79-R:** National Steel Car Guards Union (Applicant) v. National Steel Car Corporation Limited (Respondent) v. Group of Employees (Objectors). (10 employees).

**0405-79-R:** Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Texaco Canada Inc. (Respondent) v. Group of Employees (Objectors). (19 employees).

**0473-79-R:** Local 47 Sheet Metal Workers' International Association (Applicant) v. Gerald E. Baird Contractors Ltd. (Respondent). (3 employees).

### **Certification Dismissed Subsequent to Pre-Hearing Vote**

**0207-79-R:** Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. Pennyworth's Department Stores Limited (Respondent).

Voting Constituency: "All employees of the respondent employed at its retail store in Ajax, save and except store manager." (15 employees).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	11	
Number of ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of the applicant	0	
Number of ballots marked against the applicant	9	

**0311-79-R:** The Association of Allied Health Professionals: Ontario (Applicant) v. Bloorview Childrens Hospital (Respondent).

Voting Constituency: "All occupational therapists, occupational therapy technicians, physiotherapists, recreationists, speech therapists, social workers, employed by Bloorview Childrens Hospital in The City of North York save and except supervisors, persons above the rank of supervisor, students and persons regularly employed for not more than 24 hours per week." (21 employees)

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	9	

### **Certification Dismissed Subsequent to Post-Hearing Vote**

**1374-78-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Finch Paving Company Limited (Respondent).

Unit: "all construction labourers, in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	8	

**0019-79-R:** International Ladies' Garment Workers' Union (Applicant) v. Adina J. Fashions Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except forepersons, persons above the rank of foreperson, office and sales staff, designers, mechanics, maintenance, shippers and receivers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in the unit).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	20	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	17	

**0208-79-R:** Service Employees Union, Local 204, Affiliated with A.F. of L. C.I.O. C.L.C. (Applicant) v. King Nursing Home (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent in Bolton, Ontario, save and except professional medical staff, graduate nurses and undergraduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit).

Number of persons on revised voters' list		29
Number of persons who cast ballots	26	
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	14	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0054-79-R:** The Canadian Union of Public Employees (Applicant) v. The Leeds and Grenville County Board of Education (Respondent). (7 employees).

**0211-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Fun & Games Family Entertainment Centres Inc. (Respondent). (2 employees).

**0249-79-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Smith Elston Ltd. (Respondent). (5 employees).

**0327-79-R:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada "Restoration Steeplejacks" Local Union No. 172 (Applicant) v. Summit Restoration Inc. (Respondent) v. Group of Employees (Objectors). (17 employees).

**0421-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Aero Block & Precast Ltd. (Respondent). (8 employees).

**0422-79-R:** London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Alexandra Hospital Ingersoll, Ontario (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener). (24 employees).

**0424-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Culross Products Limited (Respondent). (110 employees).

**0444-79-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. American Express Canada, Inc. (Respondent) (348 employees).



**0515-79-R:** Canadian Food and Allied Workers Union Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordon's Markets, A Division of Zehrmart Ltd. (Respondent). (9 employees).

## APPLICATIONS UNDER SECTION 1(4)

**1625-78-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. F. Fentiman & Sons Limited and Fendor Sales and Services Limited (Respondents). (*Granted*).

**1628-78-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Acto Builders (Eastern) Limited and Acto Construction & Engineering Ltd. (Respondents). (*Dismissed*).

**1946-78-R:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Kustom Insulation Ltd., H. Schumann Insulation Co., and H. S. Insulation Inc. (Respondents). (*Granted*).

**0131-79-R:** United Steelworkers of America (Applicant) v. Dominion Stores Limited and Supermarket Limited (Respondents). (*Dismissed*).

**0301-79-R:** International Brotherhood of Painters and Allied Trades, and Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicants) v. W.R. Hamblin Limited and Sand Kleen Limited (Respondents). (*Withdrawn*).

**0429-79-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nickel City Plasterers Limited and Sudbury Drywall & Acoustics (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1239-78-R:** Sam Habash (Applicant) v. Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Respondent) v. Kernohan Lumber & Sash Co. Limited (Intervener). (*Dismissed*).

Unit #1: "all employees of Kernohan Lumber & Sash Co. Limited at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, part-time employees regularly employed for twenty-four hours per week or less and students employed during summer vacation." (16 employees in the unit).

Unit #2: "all part-time employees of the Kernohan Lumber & Sash Co. Limited at London, Ontario regularly employed for twenty-four hours per week or less and all students employed during summer vacation." (6 employees in the unit).

Number of names of persons on revised voters' list		23
Number of persons who cast ballots		17
Number of ballots marked in favour of Respondent	10	
Number of ballots marked against Respondent	7	

**0119-79-R:** Debbie LeBlanc (Applicant) v. The Retail, Wholesale and Department Store Union, AFL:CIO:CLC: and its Local #448 (Respondent). (*Granted*).

Unit: "all employees of the Old. St. Clair Hotel at Sarnia, Ontario, save and except manager, persons above the rank of manager and office staff." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots		6
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	6	

**0250-79-R:** James E. Ward (Applicant) v. U.A.W. Local 124 (Respondent) v. Magna-Cote Division of Magna International Inc. (Intervener). (*Granted*).

Unit: "all employees of the intervener employed at Magna-Cote in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and technical staff." (25 employees in the unit).

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots		24
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	23	

**0411-79-R:** John Miller & Sons Ltd. (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Respondent). (3 employees). (*Dismissed*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**0453-79-U:** The Jackson-Lewis Company Limited and Family Leisure Centres of Canada Limited (Applicants) v. United Association of the Plumbing and Pipe Fitting Industry of The United States and Canada, Local Union No. 46, Bill Weatherup and Certain Unknown Persons (Respondents). (*Withdrawn*).

**0459-79-U:** Lawson & Jones Limited (Applicant) v. Graphic Arts International Union and its Local 517, Ron Berman, Ralph Crandall et al (See Schedules "A", "B" and "C" attached hereto) (Respondents). (*Withdrawn*).

**0471-79-U:** Webster Mfg. (London) Limited (Applicant) v. International Molders' and Allied Workers' Union through Local 49 (London) (Respondent). (*Granted*).

**0564-79-U:** Mechanical Contractors Association Ontario, and Mechanical Contractors Association London on behalf of its members Comstock International Ltd., Steen Mechanical Ltd., Woodcroft

Mechanical Contractors Ltd., Eric Greenback Ltd., King Mechanical Contractors Ltd. and W. Besterd Plumbing and Heating Ltd. (Applicants) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593, K. Martin and D. Hodgins (Respondents). (*Granted*)

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**0297-79-U:** The Association of Canadian Film Crafts People (Applicant) v. Purple Heart Film Corporation and Motion Picture Studio Production Technicians, Local 873, (I.A.T.S.E.) (Respondents). (*Dismissed*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**1869-78-R:** United Rubber, Cork, Linoleum and Plastic Workers of America (Complainant) v. Gesco Distributing Limited, carrying on business as General Foam and Cushion (Respondent). (*Dismissed*).

**1941-78-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Rest Haven Nursing Home of St. Williams 1974 Ltd. (Respondent). (*Dismissed*).

**1942-78-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Rest Haven Nursing Home of St. Williams 1974 Ltd. (Respondent). (*Granted*).

**2148-78-U:** Karen Ostlund, Widow and Executrix of the Estate of Aage Ostlund (Complainant) v. City of North York and The North York Civic Employees' Union Local 94 Canadian Union of Public Employees (Respondent). (*Withdrawn*).

**0028-79-U:** Ontario Nurses' Association (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Granted*).

**0136-79-U:** Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (Complainant) v. The Brantford Expositor, A Division of Southam Press (Ontario) Ltd. (Respondent). (*Withdrawn*).

**0201-79-U:** Mario Moreira (Complainant) v. Laborers International Union of North America, Local 506 (Respondent) v. Ontario Hydro (Intervener). (*Dismissed*).

**0204-79-U:** Frank Ivancic & Gordon Dawkins (Complainants) v. Kraus Carpet Employees Association (Respondent). (*Withdrawn*).

**0295-78-U:** United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. ABC Plastic Moulding (Respondent). (*Withdrawn*).

**0303-79-U:** Labourers' International Union of North America, Local 1059 (Complainant) v. Norlon Builders Limited, Dave King and Maurice Demeiter (Respondents). (*Withdrawn*).



**0309-79-U:** Canadian Union of Public Employees (Complainant) v. Peace Bridge Area Association for the Mentally Retarded (Respondent). (*Withdrawn*).

**0356-79-U:** Canadian Union of Public Employees (Complainant) v. Quinte Sports Centre (Respondent). (*Withdrawn*).

**0359-79-R:** Retail Clerks Union, Local 206 (Complainant) v. Tip Top Tailors (Respondent). (*Withdrawn*).

**0377-79-U:** Service Employees International Union, Local 210 (Complainant) v. Watford Nursing Home Incorporated (Respondent). (*Withdrawn*).

**0381-79-U:** Bray Rivet & Machine Employees Association on behalf of all hourly rated employees (Complainant) v. Bray Rivet & Machine Company Ltd. (Respondent) (*Withdrawn*).

**0386-79-U:** Jack Lameront (Complainant) v. Bray Rivet & Machine Company Ltd. (Respondent). (*Withdrawn*).

**0387-79-U:** Ronald Gray (Complainant) v. Bray Rivet & Machine Company Ltd. (Respondent). (*Withdrawn*).

**0394-79-U:** Alwin Campbell, Member Local 1785 (Complainant) v. C.U.P.E., Local 1785 Oshawa, Ontario (Respondent). (*Withdrawn*).

**0401-79-U:** Service Employees International Union, Local 210 (Complainant) v. Sabin Maich carrying on business as The Golden Razor at the Tecumseh Mall (Respondent). (*Withdrawn*).

**0402-79-U:** Service Employees International Union, Local 210 (Complainant) v. Sabin Maich carrying on business as The Golden Razor at the Tecumseh Mall (Respondent). (*Withdrawn*).

**0403-79-U:** Service Employees International Union, Local 210 (Complainant) v. Sabin Maich carrying on business as The Golden Razor at the Tecumseh Mall (Respondent). (*Withdrawn*).

**0414-79-U:** Walter Marzinko (Complainant) v. Electro Porcelain Co. Ltd. and the United Steel Workers of America, Local Union No. 7581 (Respondents). (*Withdrawn*).

**0428-79-U:** Murray F. MacAlpine a Committeeman of Local 456 U.A.W. Homes Foundry Unit (Complainant) v. Homes Foundry Ltd. 200 Exmouth Street, Sarnia, Ontario (Respondent). (*Withdrawn*).

**0430-79-U:** Office and Professional Employees International Union (Complainant) v. United Community Fund of Greater Toronto (Respondent). (*Withdrawn*).

**0438-79-U:** Service Employees International Union, Local 210 (Complainant) v. Windsor Raceway Holdings Limited (Respondent). (*Withdrawn*).

**0439-79-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Simpsons-Sears Limited (Respondent). (*Withdrawn*).

**0440-79-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Bennett Foods Ltd. (Respondent). (*Withdrawn*).

**0452-79-U:** Canadian Chemical Workers Union (Complainant) v. Network Transport (Ontario) Limited (Respondent). (*Withdrawn*).

**0466-79-U:** Amalgamated Clothing and Textile Workers Union, (Toronto Joint Board) (Complainant) v. Straton Knitting Mills Limited (Respondent). (*Withdrawn*).

**0503-79-U:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Mary's Hospital, London, Ontario (Respondent). (*Withdrawn*).

## APPLICATION UNDER SECTION 39

**0087-79-M:** Marie Donada Daub (Applicant) v. Ontario Nurses Association (Respondent Trade Union) v. La Verendrye General Hospital (Fort Frances) Inc. (Respondent Employer). (*Dismissed*).

## APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**0288-79-M:** International Union, United Automobile, Aerospace and Agricultural Implement Workers and its Local 1917 (Trade Union) v. Aurora Tool and Manufacturing Company Limited (Employer).

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**1405-78-R:** The Sheet Metal Workers' International Association, The Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 269 (Applicants) v. Bourdeau Heating and Air Conditioning Limited, and Planned Mechanical Services Ltd. (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener). (*Withdrawn*).

**1626-78-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. F. Fentiman & Sons Limited and Fendor Sales and Services Limited (Respondents). (*Dismissed*).

**1627-78-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Acto Builders (Eastern) Limited and Acto Construction & Engineering Ltd. (Respondents). (*Dismissed*).

**0037-79-R:** Labourers' International Union of North America, Local 527 (Applicant) v. G. Lundy and Associates Limited (Respondent). (*Granted*).

**0226-79-R:** Hotel, Motel and Restaurant Employees and Beverage Dispensers' Union Local 757 Thunder Bay, Ontario, of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L. - C.I.O.(Applicant) v. Uptown Motor Hotel (1978) Limited (Respondent). (*Dismissed*).

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**0304-79-U:** Ontario Public Service Employees' Union (Applicant) v. Humber College of Applied Arts and Technology (Respondent). (*Dismissed*).

**0305-79-U:** Ontario Public Service Employees' Union (Complainant) v. Humber College of Applied Arts and Technology (Respondent). (*Granted*).

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**0571-79-JD:** Cape Forming Construction Ltd., and also: Westmount Engineering Construction Company Ltd. (Complaints) v. 1) United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, and also: 2) Toronto Building and Construction Trades Council, and also: 3) Dave Johnson, and also: Quintin Begg (Respondents). (*Withdrawn*).

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**1696-78-M:** Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Bruce (Respondent). (*Granted*).

**1743-78-M:** The Canadian Union of Public Employees, and its Local Number 1189 (Applicant) v. The Corporation of the City of Owen Sound (Respondent). (*Granted*).

**1905-78-M:** Canadian Union of Public Employees and its Local 2197 (Trade Union) v. The Children's Aid Society of the City of Belleville and the County of Hastings and the Town of Trenton (Employer). (*Withdrawn*).

**0103-79-M:** Office & Professional Employees International Union, Local 343 (Trade Union) v. Stelco Employees' (Primary Works) Credit Union Limited (Employer). (*Withdrawn*).



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**1512-78-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Deloraine Construction Ltd. (Respondent). (*Dismissed*).

**0036-79-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Deloraine Construction Limited (Respondent). (*Granted*).

**0337-79-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Normand & Fleming Limited (Respondent) (*Withdrawn*).

**0375-79-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Harrison Rock & Tunnel Company Limited (Respondent). (*Withdrawn*).

**0385-79-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nickel City Plastering Limited (Respondent). (*Granted*).

**0468-79-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. K & L Construction, Div. of Komelow-Leggieri Construction Ltd. (Respondent). (*Granted*).

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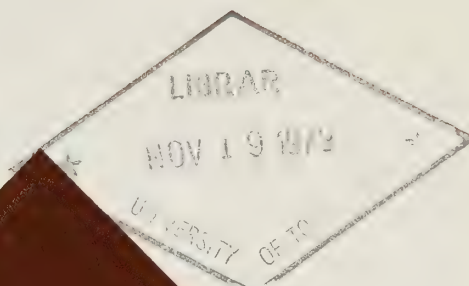
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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

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**0473-79-R** Local 47 Sheet Metal Worker's International Association,  
Applicant, v. **Gerald E. Baird Contractors Ltd.**, Respondent.

**Certification – Construction Industry – Practice and Procedure – Union filing form 54 after terminal date – Terminal date extended to allow notice to affected persons – Not extended to permit late filing of Form 54.**

**BEFORE:** R. A. Furness, Vice-Chairman and Board Members H. J.F. Ade and O. Hodges.

**DECISION OF THE BOARD;** August 13, 1979

1. In a decision dated June 29, 1979, the Board dismissed this application for certification because the applicant had failed to file Form 54, Declaration Concerning Membership Documents, Construction Industry, in accordance with *The Labour Relations Act* and the Board's Rules of Procedure.

2. Initially, the terminal date for this application was fixed as June 18, 1979. In a decision dated June 19, 1979, the Board extended the terminal date to June 26, 1979. The extension of the terminal date was necessary so that the persons who were allegedly affected by the application could receive notice of this application in Form 52, Notice to Employees of Application for Certification, Construction Industry.

3. In a letter from the applicant dated June 27, 1979, and which was received by the Board on June 29, 1979, the applicant enclosed a Form 54. In this letter the applicant stated that it had received this document on June 13, 1979. However, the applicant referred to and relied upon an alleged unfair labour practice which involved the respondent and the involvement of its counsel as a reason for not completing the Form 54. The applicant concluded its letter by requesting the Board to "extend the time limit on the acceptance of Form 54".

4. In a letter dated July 24, 1979, the solicitors for the applicant stated:

"This letter is a request on behalf of Local 47, Sheet Metal Workers, that the Board reconsider its decision dated June 29th, 1979, dismissing Local 47's application for certification in this case.

While all of the facts might not have been clearly stated in the letter from Mr. Belleville requesting that the Board extend the time limit for the acceptance of Form 54, it is our submission that there are indeed cogent reasons for which the Board should make such an order.

As Mr. Belleville pointed out in his letter of June 27, 1979, the Form 54 was received by Local 47 on June 13th, 1979. Before Mr. Belleville had an opportunity to submit the document, the employer fired all of the members in the Bargaining Unit.

On June 14th, 1979, when Mr. Belleville received the news of the firings he was out of the office because it was the Local's election day. He immediately contacted our office and instructed us to prepare the s. 79

complaint. In order for us to do so, it was necessary for the certification file to be forwarded to us in his absence. Mr. Belleville, therefore, did not have the opportunity to check the file to ensure that the Form 54 had been filed. Neither was there an opportunity to remedy this oversight during the next one and one half weeks when the file remained in our office and Mr. Belleville's time was occupied with the resolution of the s. 79 complaint which was brought about by Labour Relation's Officer Neave. When the file was received by Mr. Power, he was not aware that Form 54 had not been filed and did not direct his mind to that issue.

It is submitted that this case cannot be compared with the ordinary case of an oversight on the part of the Trade Union Official to comply with the Board's requirement concerning the filing of Form 54. The Union's failure to do so was clearly a consequence of the unfair labour practice committed by the Respondent.

Baird Construction Ltd. has shown in the clearest terms that it will have nothing to do with the Union. Here it intimidated the workers and ultimately discharged them. By getting rid of the employees and hiring new ones, the employer has succeeded in materially changing the make-up of the Bargaining Unit. This behaviour on its part which is contrary to the basic tenet underlying *The Labour Relations Act* caused such confusion in the Applicant's office that a document was overlooked which otherwise would have been filed.

When Mr. Belleville submitted the application for certification he also submitted the membership cards showing that he had the requisite degree of support to be certified. Therefore, the Board had before the terminal date proof that the Union had enough support to be certified without a hearing. Form 54 is a purely administrative document. We would submit that failure to file this document before the terminal date should not prevent these workers from succeeding in their application for certification.

In view of all of these circumstances, we would respectfully ask that the Board reconsider its decision of June 29th, 1979, and extend the terminal date for this application."

5. The Board has considered the representations before it. The respondent's conduct did not in itself prevent the completion and filing of Form 54. There is no indication that the failure to file the Form 54 within the time fixed in accordance with *The Labour Relations Act* and the Board's Rules of Procedure whether by the applicant or its counsel was necessarily a consequence of the alleged unfair labour practice. There is nothing in the material before the Board to support the statement that "The Union's failure to do so was clearly a consequence of the unfair labour practice committed by the Respondent". On counsel's own admission, Form 54 was in Mr. Belleville's possession as early as June 13, 1979. The complaint under section 79 was a parallel proceeding to the instant proceeding and did not, on the material before the Board, preclude the applicant and/or its counsel from perfecting this application for certification.



6. In the instant application, the applicant filed its application together with its evidence of membership. It was open to the applicant to file a Form 54 at that time. The applicant did not file its Form 54, evidence of membership and application for certification at the same time. This practice (a preferable practice in our view) is followed by many trade unions and reduces both the possibility of error and the likelihood of failing to comply with the Act and the Board's Rules of Procedure. Other trade unions mail their evidence of membership and Form 54 to the Board on the terminal date by registered mail. While this is in accordance with the Act and the Board's Rules of Procedure, filing under such circumstances delays the final disposition of an application for certification because the Board awaits the actual delivery of the evidence of membership and the Form 54.

7. The extension of a terminal date is made where notice to the persons affected by an application so requires. Such an extension is not made to enable a person to correct any deficiencies in its case. Where a late filing is caused by error or misunderstanding of the Board's requirements, the Board has refused to relieve against such late filing. See, for example, the *Addressograph-Multigraph of Canada Limited* case, [1968] OLRB Rep. March 1183.

8. The requirements for filing under *The Labour Relations Act* and the Board's Rules of Procedure are clearly set forth and the Board's application of these requirements is well known to the applicant and its counsel. In applications for certification which are filed under the construction industry provisions of *The Labour Relations Act*, the Board expedites such applications (consistent with the Act and the Board's Rules of Procedure) and is not prepared to unduly extend the time limits in such applications and delay their final disposition at the request of any of the parties unless there is a compelling reason. In our view no such compelling reason exists in this application. The Board has generally dismissed applications where Form 54 has not been filed as required under the Act and Rules of Procedure. See, for example, *The Stradwicks Ltd.* case, [1967] OLRB Rep. February 920, and the *Sovereign Construction Company Limited* case, [1966] OLRB Rep. September 422.

9. Having regard to the foregoing the Board is not prepared to reconsider its decision dated June 29, 1979.

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**0623-79-U** International Molders' and Allied Workers' Union, and its Local 279, Applicant, v. **Canada Valve Limited**, Respondent.

**Lock out – Employer closing plant and establishing new facility 38 miles away – Employer irrevocably terminating employment – Whether offering new employment at new plant changing nature of decision to terminate.**

**BEFORE:** Pamela C. Picher, Vice-Chairman.

**APPEARANCES:** *H. M. Pollit, John Black, David Butler and Edward C. Witthames for the applicant; T. K. Billings and D. Buchanan for the respondent.*

**DECISION OF THE BOARD;** August 16, 1979.

1. This is a complaint filed under section 83 of the Act alleging that the respondent, Canada Valve Limited, engaged in an unlawful lock-out by discharging its employees and moving its business to a new location. Canada Valve Limited is in the business of making fire hydrants and valves for water lines. Prior to 1979 the respondent operated both a machine shop and foundry at two separate locations in Kitchener, Ontario. Mr. Donald Buchanan, the President of Canada Valve Limited, testified that the foundry was located in an old building in Kitchener. When the machine shop was moved to Kitchener in approximately 1967, the respondent purchased sufficient acreage to provide space for an anticipated relocation of the foundry next to the machine shop.

2. In 1978, however, the respondent decided to close, rather than relocate, the foundry. The volume of the foundry's business had fallen off considerably because of a substitution of certain materials used in making fire hydrants. Additionally, the respondent found that it cost less to purchase iron from an outside source than to make it in the foundry. On December 6, 1978, therefore, the respondent communicated to the foundry employees its decision to close the foundry, effective February 9, 1979.

3. Buchanan testified that he had wanted to sell the foundry as a going concern to maintain the employment of the foundry workers but was unable to find a purchaser prior to the February 9th closing date. In addition to the two month notice of termination, the respondent provided the foundry employees with approximately four weeks severance pay. No complaint was made by the union regarding the closing of the foundry.

4. Buchanan testified that it was incumbent on the respondent to re-evaluate the circumstances relevant to the machine shop after it had decided to close the foundry. The foundry shutdown created two problems: firstly, the respondent had excess land at the machine shop location as it could no longer anticipate a relocation of its foundry; secondly, the closure of the foundry created the need to renovate the delivery facilities at the machine shop to handle increased bulk. The respondent, therefore, began to search for another location for the machine shop in order to compare the prospect of making renovations to the existing facility with the alternative of building a new facility on a smaller site.

5. At the time that these considerations were being made a Mr. John Rasmuseen made an offer to purchase the foundry. His offer to purchase, however, was conditional on the sale of both the foundry and machine shop; he was not interested in either alone. On February 23, 1979, an agreement of purchase and sale was made. Buchanan testified that he accepted the offer because the price was acceptable and because it provided for an unconditional cash settlement thereby giving the respondent sufficient funds to construct another facility for the machine shop.

6. On February 24, the following day, the respondent received the union's notice to bargain with a view to amending the collective agreement in effect between the parties. At the negotiation meeting arranged for March 13, 1979, Buchanan announced to the negotiating committee that the Kitchener plant would be shutting down on July 31, 1979 and moving to a new location, as yet undetermined, in southern Ontario. He further stated that the employees would not be going with them. In response to an inquiry as to whether some of the old employees might be hired at the new location, Buchanan said that the company felt that its first obligation was to the people in the new location but that if anyone wanted to apply "off the street" he would be given the same consideration as any other applicant. At

the same time Buchanan indicated that a few bargaining unit employees would be going to the new location as part of management. Substantially the same message was given to all machine shop employees when a meeting was held later in the day to inform the rest of the employees of the anticipated shutdown. At the same time the employees were given termination envelopes setting forth terms of termination which were basically the same as those that had been previously provided for the foundry employees.

7. The company announced on March 26th that the new location for the machine shop would be Milton, Ontario, approximately 38 miles from Kitchener. Buchanan indicated that one reason for choosing Milton was that it was located on the 401 and therefore gave the company the same vital access to major traffic routes as they had had in Kitchener. He testified that the transport of the respondent's materials is done almost exclusively by truck and that a problem with locating in a place like Burlington, for example, would have been that they would not have had direct access to the 401.

8. The parties agreed to delay negotiating an agreement to cover the period of time from the termination of their existing collective agreement until the closing of the machine shop on July 31st, 1979 until the company could make a decision on separate proposals made by the union relating to the respondent's move.

9. On March 14, 1979, Mr. Edward Witthames, the Canadian Director of the Molders Union, met with Buchanan to arrange what he described as an orderly flow of employees and the collective agreement to the new machine shop location. The union's proposal involved, among other things, amending the collective agreement to apply to the new plant, extending it to April 30, 1980, and providing employees with the opportunity to transfer to the new location with full seniority, benefits and paid moving expenses. Witthames testified that Buchanan was initially receptive to the idea. Having regard to all the evidence presented, however, the Board accepts Buchanan's testimony that he immediately told Witthames that he felt that most of the employees at the new location would be new employees and that he did not feel it was right to impose a union on a group of new employees. Notwithstanding his reservation about the union's proposals, Buchanan agreed to present them at a Director's meeting where it was ultimately recommended that they not be accepted.

10. The union and company resumed negotiations for the extension of the previous agreement on May 25, 1979 which resulted in a memorandum of agreement. On June 18 the employer was informed that the memorandum of agreement had been accepted by the union members. The employer then prepared a memorandum for the union's signature. Although the union assured the employer that the collective agreement would be signed on June 25th, Mr. Buchanan testified that he had not yet received back a signed copy. Counsel for the union took the position at the hearing that the parties were not at that time covered by a collective agreement because the document had not yet been signed.

11. The sections of *The Labour Relations Act* relevant to the union's allegation that the employer wrongfully locked out its employees by terminating them and moving its machine shop to Milton, Ontario are set out below:

"1.-(1) In this Act,

(i) 'lock-out' includes the closing of a place of employment, a suspen-



sion of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees.

68. Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.

63.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties a notice that he does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

83. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that an employer or employers organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out."

Under section 63(1) strikes and lock-outs are prohibited during the term of a collective

agreement. Where no collective agreement is in operation, section 63(2) prohibits a strike or lock-out until the parties have exhausted conciliation services. Even if at the date of this application no collective agreement was in operation between the parties as alleged by counsel for the union, there was no indication that the parties had requested, much less exhausted, conciliation services. Accordingly, whether or not there was a collective agreement in operation at the time of this application the parties were not in an open period and the employer could not, therefore, lock-out its employees.

12. A lock-out within the meaning of the Act has both an objective and subjective dimension. To establish the existence of a lock-out the applicant must show that there has been a closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees. In this case the employer has closed its place of employment and refused to continue to employ all of its machine shop employees at the Kitchener location. The objective aspect of a lock-out, therefore, is readily established. The complainant must also show, however, on the balance of probabilities, that the act of closing and refusing to continue to employ was carried out by the employer in an effort to induce or compel his employees to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms and conditions of employment.

13. In determining whether the employer's motive is designed to compel or induce employees to refrain from exercising their rights or to agree to changes in terms of employment etc., the Board has found it helpful to look to, among other things, whether the decision to close the place of employment or refuse to continue to employ was a revocable or irrevocable one. (see *Harry Woods Transport*, [1976] OLRB Rep. July 341; *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401 and *Rondar Services Limited*, [1977] OLRB Rep. Oct. 655). If the decision was revocable an inference might be drawn that it was intended to be used as a lever to compel or induce the employees to refrain from exercising rights or privileges under the Act or to agree to altered conditions of employment. If, on the other hand, the employer's decision was irrevocable and could not be viewed as a lever then it would be more difficult to imply that the closing or refusal to employ was designed to cause an alteration of employment behaviour. A decision which was irrevocable with respect to only a portion of the employees, though, might cause the Board to conclude that the irrevocable decision of the employer relating to one group of employees was designed to alter the behaviour of the other group of employees remaining within his employ (see *Rondar Services Limited*, *supra*).

14. In this case it is virtually uncontested that the employer's decision to close the machine shop in Kitchener was irrevocable. Having regard to all the evidence the Board is further satisfied that it was motivated solely by *bona fide* business concerns. Faced with inherent problems with the machine shop caused by its decision to close the foundry, the employer was forced to decide whether to make adjustments to the machine shop premises or find a new location. The Board fully accepts the employer's evidence that the decision to sell or renovate that it would otherwise have had to make respecting the machine shop was, in effect, made for it when it received an offer for the foundry conditional upon the sale of the machine shop. The evidence demonstrates that the employer had had some difficulty selling the foundry and was, in view of the circumstances, pleased to accept a cash offer which would not only relieve it of the foundry but at the same time provide it with funds to purchase a new machine shop. Having regard to all the evidence, the Board does not accept,

therefore, that the closing of machine shop was motivated in any way by a desire to compel or induce the employees to modify or alter their employment behaviour.

15. The union further contends, however, that the employer's decision to terminate all its employees from the Kitchener machine shop was not an irrevocable decision. It argued that despite the formal notices of termination given to all machine shop employees, the employer, by relocating only 38 miles away, in fact invited the employees to come with him and actually expected and wanted them to continue their employment but under altered conditions: that is, without a collective agreement and with no seniority.

16. Counsel noted the agreed fact that the parties had been through a bitter strike in 1976 during which a major item in dispute was the Cola clause. Counsel asked the Board to find that Buchanan's comment to Witthames during the life of the previous agreement to the effect that the uncapped Cola clause was "killing" him was reflective of the extent of management's discontent and was the irritation prompting its desire to induce its employees to agree to come to Milton without the benefit of the collective agreement.

17. To further support his position, counsel for the union emphasized the undisputed fact that many of the persons terminated were longstanding employees and asserted that it should be presumed that the employer would want to have the benefit of their abilities in reopening at the new location. Counsel further pointed to the clause on the back of the severance pay cheques received by machine shop employees which reads as follows:

"By the endorsement of this cheque for severance pay received by me from Canada Valve Limited, I hereby waive any further claims on the Company and all seniority rights. It is understood that I am eligible to receive pay for any vacation to which I am entitled as of my date of termination. It is further understood that any pension benefit which I am entitled to is not affected by this waiver."

Counsel argued that there would have been no need to sign a waiver of this nature unless the employer expected the old employees to continue to work for them at Milton.

18. Counsel for the employer, on the other hand, argued that Buchanan's comments concerning the Cola clause were made in a conversation during which many aspects of the parties' labour relations were discussed and were not indicative of an inability to abide by the provisions of the collective agreement. Counsel further asserted that there was no evidence whatsoever to suggest that the employer's actions were designed to induce or compel the employees to continue to work for it under altered conditions. Counsel contends that the evidence shows that the employer was largely indifferent as to whether the Kitchener employees followed the company to Milton.

19. After reviewing the evidence in its entirety the Board accepts the respondent's interpretation of Buchanan's comments concerning the Cola clause. While Buchanan expressed frustration with the uncapped Cola clause there was no evidence from which the Board would conclude that Buchanan was excessively distracted by it or that it motivated him to lock-out the employees.

20. Additionally, the Board finds nothing in the evidence to suggest that the employ-



er's decision to terminate its employees was anything but irrevocable or that his expressed willingness to re-employ them if they applied along with anyone else at the Milton location was designed to compel or induce them to accept altered conditions of employment. The employer's decision to re-locate its machine shop only 38 miles away in Milton, a distance to which Kitchener employees could commute, does not, in the context of the evidence presented, raise a suspicion that the employer wanted or expected its former employees to come to Milton under altered conditions of employment. The Board accepts that the employer chose the Milton location largely because of its direct access to the 401 and not because it was close enough to enable the Kitchener employees to continue to work for him. As well, the proposition that the employer really wanted the employees to come to Milton to have the benefit of their long years of experience is undermined by the undisputed evidence that most of the work was performed by semi-skilled labourers and did not require expertise. With respect to the waiver on the back of the severance pay cheques, the force of the union's argument is blunted by the evidence that the same clause was put on the back of the severance pay cheques presented to the foundry employees.

21. The employer on its own initiative provided the employees with notice of termination in excess of four months as well as severance pay, a termination package which far exceeds the statutory obligations an employer has under *The Employment Standards Act, 1974*. The employer's consideration in this regard is inconsistent with a desire to induce or compel these employees to come to Milton under altered conditions of employment. The very length of the notice of termination would assist employees in finding alternate employment in Kitchener rather than move to Milton and, therefore, runs counter to a conclusion that the employer was seeking to compel or induce them to follow the company to Milton and agree to work under altered conditions.

22. In summary, the Board is fully satisfied that the employer's decision to terminate the machine shop employees and move to Milton was not designed to compel or induce the employees to refrain from exercising rights or privileges under the Act or agree to an alteration in their terms or conditions of employment. Accordingly, the Board finds that the actions of the employer do not constitute a lock-out within the meaning of the Act. The application is therefore dismissed.

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**1804-79-R** United Brotherhood of Carpenters and Joiners of America,  
Applicant, v. **Century Flooring Limited**, Respondent.

**Appropriateness – Bargaining Unit – Construction Industry – Employee – Employer using dependent contractors – Board describing bargaining unit by referring to dependent contractors working as carpenters.**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *H. P. Rolph for the applicant and C. Eames for the respondent.*

**DECISION OF THE BOARD;** August 1, 1979.

1. The Board finds the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

2. This is an application for certification falling under section 108 of the Act. The respondent, in its reply, advised the Board that the persons affected by the application were independent contractors and not employees of the respondent. The respondent's business, in respect of this application, is that of a sub-contractor in the construction industry engaged in the supply and installation of resilient flooring. While the business is operated from Winnipeg, Manitoba, on the date of the application, the respondent was engaged in the performance of a contract to supply and install flooring in a school in Fort Frances, Ontario.

3. The report of the Board's Labour Relations Officer who conducted the examination into the relationship between the respondent and the three persons who are affected by the application deals with one of those persons only. The Officer's hearing was attended by the respondent but the applicant was neither present nor represented. While the report does not contain any agreement of the respondent to accept as representative the examination of the one person, counsel who represented both parties at the Board's hearing treated the facts in the report as though they were representative. In the circumstances, the Board considers it appropriate to do likewise. The Board has considered the Officer's report and the parties representations as to the conclusion which the Board should draw from it. Now the Board is required to determine whether these persons, within the context of their relationship with the respondent, are employees (including dependent contractors) within the meaning of the Act.

4. Section 1(gb) of the Act defines the term "employee" so as to include a "dependent contractor". Section 1(ga) of the Act defines a "dependent contractor" as

"... a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;"

In *Abdo Contracting Company Ltd.*, [1977] OLRB Rep. Apr. 197 the Board reviewed fully the statutory purpose of the "dependent contractor" provisions of the Act as well as the nature of the conditions which would determine if a "dependent contractor" relationship existed between persons. At paragraph 27 it commented as follows:

"In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but must also be 'under an obligation to perform duties for that person' roughly analagous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analagous to that of employer and employee."

5. Upon all of the evidence before us and having regard for the submissions of the parties, the Board finds that, as of the date of this application, the persons affected by it were:

- a) in a position of economic dependence with respect to the respondent; and
- b) performing work closely analagous to that of an employee when they were fulfilling their obligation to the respondent of installing flooring materials on the project in question.

Therefore, in all the circumstances of this application, the Board finds that the persons affected by it are dependent contractors within the meaning of section 1(ga) of the Act and thus, in accordance with section 1(gb), are to be treated as employees for the purpose of this application.

6. Having regard to the foregoing and to section 6(4) of the Act, the Board further finds that all dependent contractors working as carpenters and carpenters' apprentices for the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

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10. A certificate will issue to the applicant.

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**1280-78-U** Dennis H. O'Keefe, (Complainant), v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880 (Respondent), v. **Concrete Construction Supplies**, (Intervener).

**Duty of Fair Representation – Evidence – Practice and Procedure – Incident giving rise to complaint occurring eight months before filing – Whether extreme delay barring hearing on merits – Complainant tendering evidence of five years of alleged non-representation by union – Whether admissible.**

**BEFORE:** G. Gail Brent, Vice-Chairman.

**APPEARANCES:** *Dennis H. O'Keefe for the complainant; Ken Petryshen and Ray Doe for the respondent; W. G. Phelps and John Toneatti for the intervener.*

**DECISION OF THE BOARD;** August 23, 1979.

1. The complainant has complained that he has been dealt with by the respondent union contrary to the provisions of section 60 of the Act, and requests that the employer, Concrete Construction Supplies (hereinafter called the company), reinstate him without loss of seniority and with full compensation and benefits.



2. At the outset both the union and the company submitted that this matter ought not to be heard because of the unreasonable delay in bringing the complaint. The union also objected that the complaint did not give sufficient particulars. Counsel for the union stated that he had requested particulars from the complainant, but that this request would not have been delivered to the complainant until late on the Tuesday night before the hearing. Counsel did not suggest that the matter not be heard because of failure to provide particulars when requested, but stated that no particulars were given at or after the time of the complaint and that this along with the delay should bar the complaint.

3. The complaint states in paragraph 4:

“On or about 14 December 1976 the grievor was dealt with by Mr. Joseph R. Doe, Secretary Treasurer Teamsters Local 880 of the respondent contrary to the provisions of section 60 of The Labour Relations Act in that he did on his own behalf or on behalf of the respondent:

Unfairly represented the complainant. Grievance filed 23 Nov. 76.”

4. At the request of the Board the complainant stated that the essence of his complaint against the respondent union was that on or about December 14, 1976 Mr. Doe made promises and statements to him concerning an “Infraction-Lay off-Discharge Report” given to him by the company on November 17, 1976. Those statements concerned the status of the report as disciplinary action taken against him and the alleged promise was that the respondent union would fight the report “in every court in the land” if it was held against him by the company. The essence of the complaint is that the respondent union allegedly lied to the complainant and failed to keep this promise when the report was used as part of the complainant’s disciplinary record in a subsequent arbitration concerning his discharge. The hearing in that arbitration took place on August 24, 1977; the decision was communicated to the parties on October 26, 1977; and the written reasons of the majority decision were released on January 16, 1978.

5. Keeping the above dates and the nature of the complaint in mind, the Board will consider the matter of delay. The complaint is dated October 20, 1978. The complainant was a bit fuzzy about dates, but it is clear that he was not sent a copy of the arbitration award by the Chairman of the board and it is probable that he knew at least by early to mid 1978 that the respondent union would not apply for judicial review of the award of the board of arbitration. I would, therefore, consider that, given the nature of the complaint, the complainant would have no cause for complaint against the respondent until he learned that no action would be taken following the dismissal of his discharge grievance by the board of arbitration. The making of such a decision by the respondent union would surely be premature without first perusing the written reasons of the board of arbitration. Therefore at most there would be a delay of around eight months between the time the complainant learned that the alleged promises of December 14, 1976 were not being carried out. It is not the practice of this Board to bar complaints under section 79 unless there has been extreme delay. In the case of complaints involving alleged violations of section 60, the Board’s practice has usually been to hear the complaint and consider delay, if it is unreasonable, when considering the relief to be given. In this case, the delay is not extreme and will not bar the complaint from being heard.

6. The facts in this case are not seriously in dispute. On November 17, 1976, the complainant was given an "Infraction-Lay off-Discharge Report" (Exhibit #1). The complainant filed a grievance (Exhibit #2) and the respondent union notified the company that it would be proceeding to arbitration in the matter (Exhibit #3). Sometime later, possibly on December 13, 1976, the complainant was asked to come to the union offices to meet with Mr. Doe, the Secretary/Treasurer of Local 880, to discuss his grievance. At that meeting, Mr. Doe took the position that the report given the complainant by the company (Exhibit #1) was not disciplinary, i.e. a reprimand, but simply notice that a rule had been broken. Apparently, this position had also been taken by Mr. May, the union president when the complainant showed him the report in late November. The position taken by Mr. Doe that day was one which he told the complainant was justified by arbitration cases concerning the definition of "infraction" and "reprimand" as used in the collective agreement.

7. The complainant admitted that he agreed to withdraw the grievance at that time on condition that he would get some sort of letter from the union protecting him and after hearing Mr. Doe assert that the union would "take the matter before every court in the land" if the company ever tried to use the matter against him. (Mr. Doe said that it is possible that he made this statement about "every court in the land" so I will accept it as the statement made that day). Subsequently, Mr. Doe wrote to Mr. John Toneatti, the company's manager, with a copy to the complainant (Exhibit #4) setting out the union's position concerning the grievance and infraction and withdrawing the grievance.

8. Unknown to Mr. Doe, Mr. Toneatti had written to the complainant on November 23rd (Exhibit #6) concerning the company's position in the matter. The complainant did not mention the letter to Mr. Doe nor was there any evidence that it ever was placed in the complainant's file. The complainant did copy the letter and place it in the business agent's box at the union offices, but there was no evidence about when this was done. Nevertheless, the union's position throughout was that the company had never done anything but notify the complainant of some sort of rule infraction and had not taken any disciplinary action against him.

9. There is absolutely no evidence to suggest that Mr. Doe did not seriously consider that this was the correct position to take. Mr. Doe's opinion was based on his interpretation of the company's action and the cases dealing with this language. As a union official, it is not unreasonable for Mr. Doe to make such judgments and express his opinion to those contemplating arbitration. Moreover, the choice concerning the withdrawing of the grievance was left entirely up to the complainant.

10. When the complainant was subsequently discharged in March, 1977, it became clear again that the company was indeed treating the November report (Exhibit #1) as disciplinary. At the arbitration hearing on August 24, 1977 the union was represented by counsel and the decision of the majority of the board of arbitration makes it clear that counsel argued forcefully that the report of November 17th ought not to be regarded as disciplinary. The decision of the majority rejected this argument and held that there was disciplinary action taken against the complainant. Mr. Doe's evidence was that the arbitration award was studied by Mr. May, the president, by Mr. Holman, a business agent, and their legal counsel. Mr. Doe said that the policy of the respondent is to apply for judicial review if their counsel advises it. No such advice was given here and no application was made by the respondent.

11. The complainant apparently bases his view that a judicial review would succeed on comments he said the union's counsel made to him after the hearing. He also believes that the respondent had made him an absolute promise to proceed further if the November matter was ever deemed to be disciplinary.

12. In order to succeed the complainant must show conduct which is in violation of section 60 of the Act which is reproduced below:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

In this case there is absolutely no evidence of any such conduct. The respondent gave an opinion in December, 1976 concerning the company's actions. That opinion was honestly held and based on an understanding of what had been decided in arbitration cases. The complainant acted on this advice and withdrew his grievance. Any assurance about fighting something through every court in the land should surely not be taken literally, but in any event the respondent objected to the use of the November report as part of the complainant's disciplinary record at the arbitration hearing concerning his discharge grievance and did not apply for review of the award because it considered that such an application would not succeed. It would appear that a decision not to proceed with what is considered, on the basis of advice, to be a potentially unsuccessful application for judicial review is a reasonable one to make even in the face of some sort of pledge to fight the matter up to the Supreme Court of Canada. It would appear that the respondent did everything reasonable to represent the complainant's interest and there is nothing here which would suggest that it acted arbitrarily, discriminatorily or in bad faith.

13. At the hearing the complainant stated that he wished to introduce evidence concerning a pattern of non-representation of other of its members over the past five years. The Board ruled then, and hereby affirms its ruling, that such evidence would be irrelevant to the specific matter placed before it by the complainant and that it was not concerned with any alleged wrongdoing by the respondent against any other employees.

14. For all of the reasons stated above, the complaint is hereby dismissed.

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**0637-79-R** Ontario Public Service Employees Union, (Applicant), v.  
**Cybermedix Limited**, (Respondent).

**Appropriateness – Bargaining Unit – Practice and Procedure – Employer requesting Officer's appointment to establish facts relevant to appropriateness of unit – Facts if proved not conclusive of determination – Officer not appointed – Whether single municipal unit appropriate – Many locations and no employer interchange.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members B. K. Lee and E. C. Went.

**APPEARANCES:** *Pauline R. Anidjar, Barbara J. Theaker and Macrena J. S. Cruickshank for the applicant; E. L. Stringer, Q.C., and V. Bellville for the respondent.*

**DECISION OF THE BOARD;** August 7, 1979.

- 1 This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The respondent operates a medical testing laboratory service. It has some seventeen locations in Metropolitan Toronto, some of which are specimen collection centres, some of which do both collecting and testing and one of which also includes administrative offices. The union requests certification for a bargaining unit of all employees of the respondent in Metropolitan Toronto with the exception of office and clerical employees. The respondent submits that each location should be a separate bargaining unit or that, alternatively, the employees should be grouped in six separate bargaining units. A further alternative put forth in the respondent's reply is that two bargaining units be established, one being comprised of its central laboratory at 78 Oakdale Road, Downsview, with all other employees falling within a residual unit.
4. Counsel for the respondent requested that the Board appoint a Labour Relations Officer to inquire into the composition of the bargaining unit. The employer wanted to establish in evidence that there was no interchange of employees between the locations and that the functions of immediate supervision and hiring were confined either within the separate locations or several small groups of them. For those reasons it submitted that a number of separate bargaining units should be established. At the hearing Counsel for the respondent stated that if there were a regular interchange of employees the respondent would agree to the Board's usual municipality-wide bargaining unit for all of its locations in Metropolitan Toronto.
5. The interchange of employees between two or more locations is but one of a number of factors considered by the Board in its determination of an appropriate bargaining unit. The Board must determine whether there is a substantial community of interest among employees in a proposed bargaining unit. It therefore considers the nature of the work performed, the conditions of employment, the skills of employees, the employer's administrative framework, the geographic circumstances of the respondent's operation and the functional coherence and inter-dependence of the employees in its several locations. (*Usarco Ltd.* [1967] OLRB Rep. Sept. 526)

6. In this case the employees in the respondent's various locations exercise the same skills and perform the same kind of work under similar conditions of employment within the tiered framework of a single administration. They all work within Metropolitan Toronto, an area which the Board has determined to be an appropriate geographic designation for a multi-location service enterprise. (*The Goodyear Service Stores* 65 CLLC, ¶16,018) And it is clear from the representations before the Board that in the collecting and testing which they perform, all of the employees are, to a substantial degree, functionally inter-dependent.

7. When an employer operates a number of essentially similar service outlets within a municipal area it is, generally, not most conducive to collective bargaining to parcel the employees within that area, all of whom have similar bargaining interests, into a series of fragmented bargaining units. The possibility that some of the bargaining units might be represented by one union, some by another, while others may have no union representation at all can lead to invidious results for the employees, for the unions concerned and for the employer. Absent compelling reasons to the contrary in that situation a single bargaining unit of all employees with the municipality is generally the most rational and viable bargaining unit. (See *The Goodyear Service Stores*, *supra*, and cf. *Fotomat Canada Limited* [1979] OLRB Rep. Apr. 306) There may be considerations of industrial relations policy such as employee access to collective bargaining and the ability to organize for the purpose of union representation which may override the Board's normal aversion to fragmentation (See *McDonald's Restaurants of Canada Limited* [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House* [1974] OLRB Rep. Nov. 7; *Canada Trustco Mortgage Company* [1977] OLRB Rep. June 330) but those concerns do not apply in the instant application.

8. In this case the fact that there may be no substantial interchange of employees between locations and that the functions of hiring and supervision are confined within the locations, even if proved through the inquiry of a Board Officer, would not alter the conclusion that a single bargaining unit would best serve the common interests of the employees concerned. The Board will therefore not order a formal inquiry into the composition of the bargaining unit, there being no *prima facie* reason to do so, nor depart from its normal policy of adopting a municipality-wide bargaining unit for the employees in the respondent's service outlets and testing facilities.

9. For the foregoing reasons the Board finds that all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

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12. The Board further finds that all employees of the respondent in Metropolitan Toronto, Ontario, regularly employed for not more than 24 hours per week, students employed for the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical employees, constitute a unit of employees of the respondent appropriate for collective bargaining.

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**1982-76-U** B. E. Kerber, (Complainant), v. **Douglas Aircraft of Canada Ltd.**, Local 1967 U.A.W., (Respondents).

**Arbitration – Duty of Fair Representation – Employee waiting five years for arbitration – Delay attributable to priority ranking and numbers of unresolved grievances – Whether delay in arbitration process violation of section 60.**

**BEFORE:** R. O. MacDowell, Vice-Chairman.

**APPEARANCES:** *B. E. Kerber for the complainant; J. B. Noonan, J. D. Dollery and Kevin Moore for the respondent employer; Clare Meneginin, Munir Khalid and Bill Patrick for the respondent trade union.*

**DECISION OF THE BOARD;** August 15, 1979.

1. This is a complaint filed under section 79 of *The Labour Relations Act*, alleging that the respondent trade union has contravened section 60 of the Act. That section provides as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

The complainant contends that the union’s breach of section 60 of the Act lies in its failure to process his grievance through to arbitration.

2. Mr. Kerber was one of some three-thousand employees employed by Douglas Aircraft Company at its Toronto plant. In February, 1976 market conditions required the company to lay off a number of its employees. The collective agreement then in operation provided that in the event of a lay-off employees with the requisite ability could displace (“bump”) less senior employees and thereby remain employed - albeit in a different position from that which they normally occupied. Alternatively, employees were entitled to accept the lay-off and be placed on a recall list so that they could be called back when work became available. Mr. Kerber chose this latter alternative. On 9th February, 1976, he voluntarily elected in writing to be laid off and placed on the recall list rather than exercise his seniority rights, and “bump” into another position.

3. At the time of his lay-off Mr. Kerber was employed as a paint inspector. The company takes the position that there was not, and is not now, enough work of the kind formerly done by Mr. Kerber to justify his recall. Mr. Khalid, the union’s plant chairman, testified that, on the basis of his own investigation and the inquiries he has made, he is satisfied that the company’s position is correct.

4. Some time after the notice of lay-off and his election to go on the recall list, Mr. Kerber began to have second thoughts concerning the propriety of the company’s conduct. He initiated discussion with his shop steward, sought to obtain a meeting with the company



and, ultimately, decided to file a grievance alleging that his lay-off was not in compliance with the terms of the collective agreement. In his evidence he admitted that he did not seek to file a grievance until after the time limit for doing so set out in the collective agreement had expired. The company took the position (which it still maintains) that compliance with this time limit is a mandatory condition precedent to arbitration, and that failure to comply with the time limit deprives an arbitrator of any jurisdiction to consider the grievance. It is unnecessary to consider the merits of the company position, save to note that the Supreme Court of Canada has held that a time limit can have this effect (see: *Union Carbide Canada Ltd. v. Weiler*, [1968] SCR 966. and *General Truck Drivers Union, Local 938 v. Hoar Transport Co. Ltd.*, [1969] SCR 634.); and, in response to these decisions, the Legislature enacted section 37(5a) of *The Labour Relations Act* which gives an arbitrator a discretion to relieve against non-compliance with time limits. In any event, notwithstanding the company's preliminary objection, the union processed the grievance to the arbitration stage. It has not yet been taken to arbitration, and the union advised the Board that it could not reach arbitration before 1980 or early 1981. It is the prospect of a five-year delay in the resolution of his grievance which prompted Mr. Kerber to file the present complaint. He does not suggest (and there is no evidence) that in dealing with his complaint the union officials were discriminating against him, or were motivated by personal animosity or any other improper considerations. It is common ground among all the parties that there is a large back-log of grievances, all of which have been processed through the pre-arbitration stages of the grievance procedure. Mr. Kerber is one of a number of grievors who have been waiting for arbitration. Like Mr. Kerber, some of these grievors have been waiting for years.

5. Arbitration of employee grievances is an integral part of the industrial relations process in this province. Parties are compelled by statute to resort to arbitration for all disputes concerning the interpretation, application, administration, or alleged violation of a collective agreement. As originally envisaged, arbitration was to be an expeditious, inexpensive and relatively informal means of resolving such disputes. Arbitration was to provide an alternative both to industrial conflict and to the apparently cumbersome process of civil litigation. Nevertheless, over the years arbitrators and judges (through judicial review) have developed a complex set of rules and principles which are applied in the interpretation of collective agreements. This "industrial jurisprudence" is now a highly specialized aspect of labour relations law. Unfortunately, as the arbitration process became more complex and sophisticated, it also became much more expensive and time-consuming. These developments have been considered at length elsewhere, (see: Ontario, *Report of the Industrial Inquiry Commissioner Concerning Grievance Arbitration under The Labour Relations Act and The Hospital Labour Disputes Arbitration Act*, 1978, Arthur Kelly Commissioner,) and have recently prompted legislative intervention designed to expedite the process. (See: *The Labour Relations Amendment Act*, 1979, S.O. 1979 c.32. For this case, it is sufficient to note that, at the present time, delays of more than a year are not extraordinary. A delay of five years, as in the present case, calls for an explanation.

6. The collective agreement with which we are here concerned contains two features which, in combination, contribute to delay. The agreement designates a specific panel of arbitrators who, as it turns out, are among the most experienced and busy practitioners in the province. The resolution of grievances depends, at least in part, on their availability. In addition, the collective agreement includes a priority system for the scheduling of arbitrations. Discharge and discipline cases are given a higher priority than cases such as Mr. Kerber's. There is nothing inherently unfair or unreasonable in either of these provisions; however,

during the relevant period the parties had, what might best be described as a difficult collective bargaining relationship which generated a high volume of grievances. Mr. Kerber's grievance is but one of these and, as already pointed out, it is a grievance to which the collective agreement itself assigns a relatively low priority.

7. Section 60 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances; but it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, but in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgment of a lawyer. Union officials are entitled to make honest mistakes.

8. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interest of both parties to seek an "out of court" settlement which is more modest than either might have obtained had it been entirely successful before the adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation. The generosity of the settlement will depend upon the skills of the negotiating parties, the merits of the claim, the cost of the litigation process and the degree of "downside risk", i.e., the long-term ramifications of an adverse judgment. These considerations are equally applicable to the settlement of disputes arising out of collective agreements; but there is one important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. The relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial, nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the profitability of the enterprise and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive collective bargaining relationship depends upon the development of a spirit of compromise and co-operation. Regardless of the importance of any particular grievance, it will inevitably be only one of many (perhaps thousands) which the parties will be required to resolve during the currency of their relationship. It is in this context that the grievance procedure must be viewed. If either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials spend needless hours discussing inconsequential or ill-founded grievances. Moreover, as a practical matter, a rigid insistence on one's "strict legal rights" is likely to provoke a response in kind, and yield only short term gains.

9. Mr. Kerber contends that the trade union has been neglectful, indifferent and perhaps negligent in processing his claim. Counsel for the employer, on the other hand, argues that the union has been entirely too zealous in processing the claims of employees, in-



cluding the claim of Mr. Kerber. He contends that the "backlog" of unresolved grievances results from the union's failure to settle minor or unmeritorious ones. In his view the union has an obligation to settle such cases in order to expedite the resolution of cases which actually have merit. Counsel argued that Mr. Kerber has never had a good case, and the union should have told him so in the first place. In his view the union's failure lies not in any breach of section 60, but in carrying forward the case as far as it has. Counsel criticized the union's practice of "keeping grievances alive" by processing them through all of the pre-arbitration stages, and waiting until the arbitration stage has been reached before making its final decision on whether the matter should, in fact, be referred. The union acknowledged that the Grievance Committee does make a final pre-arbitration assessment and that, as a result of this assessment, the grievance is either withdrawn, settled or referred on to arbitration.

10. As a matter of good judgment, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. There is nothing wrong, however, with conducting a final pre-arbitration assessment, and settling at that point. It may only be in the final preparation of the case that its legal, or evidentiary, weaknesses are exposed or confirmed. Settlements "at the court house door" are not uncommon in civil matters or labour arbitration.

11. Has there been a breach of section 60 in the present case? Does a delay of several years in the processing of Mr. Kerber's grievance evidence a *per se* violation? In the circumstances the Board is satisfied that it does not. There is no evidence of any improper motive on the part of union officials, nor is there any evidence that the respondent has discriminated against Mr. Kerber in the way that it has handled his particular grievance. There is nothing improper in deciding, in advance, that some classes of grievance are more important than others and should, therefore, be given priority; nor is it patently unreasonable to give discharges special consideration. Indeed, section 37a, which is intended to expedite the arbitration process, does precisely that. It might also be observed that in succeeding collective agreements the trade union has negotiated a higher priority for lay-off grievances.

12. In the absence of an inexpensive, expeditious, statutory arbitration process, the parties must negotiate their own procedures. Like other terms and conditions of employment, the grievance procedure will reflect their particular needs as well as their relative economic strength and bargaining power, and an "improvement" in the grievance procedure may well involve either a strike or the compromise of other bargaining goals. In the present case, the respondents have chosen to maintain their grievance procedure in approximately the same form for a number of years. The particular collective agreement before me represents a complicated pattern of interrelated compromises and trade-offs. While it undoubtedly has the power to do so, I do not think the Board should lightly interfere with the bargain that the parties have struck, simply because one provision thereof appears to be improvident or inadequate in its application to a particular set of circumstances. I am satisfied, on the evidence before me, that the trade union has not acted in a manner that is "arbitrary, discriminatory, or in bad faith" in the representation of the complainant. The negotiated grievance procedure is cumbersome and cannot respond quickly to resolve a high volume of grievances, but I am not satisfied that this in itself evidences any breach of section 60. The complaint is therefore dismissed.

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**0695-79-R** Labourers' International Union of North America, Local 183, Applicant, v. **Evercrete Limited**, Respondent.

**Appropriateness – Bargaining Unit – Construction Industry – Board not excluding students or part-timers from construction industry units – Appropriate unit for fence installation reviewed**

**BEFORE:** R. A. Furness, Vice-Chairman and Board Members W. Gibson and C. Ballentine.

**DECISION OF THE BOARD;** Aug. 2, 1979

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5. The applicant is seeking certification with respect to a proposed bargaining unit of "all employees of the respondent in or out of Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton, the Township of Pickering in the County of Ontario, engaged in the installation and/or erection of fences, save and except non-working foremen and persons above the rank of non-working foreman."

6. The respondent in its reply has stated that the following bargaining unit is appropriate for collective bargaining, "employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton, the Township of Pickering in the County of Ontario, engaged in the installation of 'Evercrete type' fencing, save and excepting non-working foremen, persons above the rank of non-working foremen, part-time workers and students".

7. In paragraph thirteen of its reply the respondent has stated:

"Of the ten employees of the respondent on the job in respect of which the application for certification has been made, six are students and are therefore not appropriate for collective bargaining."

In paragraph 14(2) of its reply the respondent has consented to the application being disposed of by the Board without a hearing by the Board and has made the following representations thereon:

"Of the ten employees of the respondent on the job in respect of which the application for certification has been made, six are students and are therefore not appropriate for collective bargaining."

8. In bargaining units which are determined under the construction industry provisions of *The Labour Relations Act*, it has not been the practice of the Board to exclude either part-time employees or students. There is nothing in the material before the Board which would cause it to exclude either part-time employees or students.

9. The bargaining unit which has been requested by the applicant has previously been determined to be an appropriate bargaining unit pursuant to section 6(1) of *The La-*

*bour Relations Act*. See, for example, the *Lundy Fence Company Limited* case, [1969] OLRB Rep. July, 453. The Board has considered the representations of the parties and pursuant to section 6(1) of *The Labour Relations Act* finds that all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the installation and/or erection of fences, save and except non-working foremen and persons above the rank of non-working foremen, constitute a unit of employees of the respondent appropriate for collective bargaining.

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11. The Board notes that the applicant's membership position is such that in any event the inclusion or exclusion of students does not affect the applicant's entitlement to certification.

12. A certificate will issue to the applicant.

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**0733-79-R Ontario Public Service Employees Union, (Applicant), v. Fergus District Ambulance Service (Respondent).**

**Bargaining Unit – Certification – Practice and Procedure – Union requesting all employee unit – Employer seeking exclusion of office and clerical employees – No office or clerical employees employed – Whether Board granting exclusion of non-existing classification**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members J. D. Bell and M. J. Fenwick.

**APPEARANCES:** *Pauline R. Anidjar appearing for the applicant; L. A. Hollinger, Alice M. Bogne and Chas Southwell appearing for the respondent.*

**DECISION OF THE BOARD;** August 16, 1979.

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2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

4. The parties were in dispute at the hearing as to the level of managerial exclusions. The employer argued that the Board should exclude supervisor and those above the rank while the union argued that supervisors are employees within the meaning of the Act and that the Board should exclude the operations manager and those above the rank. The employer acknowledges that the supervisor cannot hire, fire or grant time off and that he has

never disciplined. It was admitted that discipline must be cleared through the operations manager. The Board is satisfied therefore, and hereby declares that the supervisor does not exercise managerial authority within the meaning of section 1(3)(b) of the Act and is therefore an employee within the meaning of the Act.

5. The union acknowledged that it was seeking to represent only the operations personnel but disputed the employer's proposed exclusion of office and clerical employees on the basis that there is no one in the office and clerical classifications. The employer, on the other hand, argued that if the office and clerical exclusion is not granted, office and clerical workers would fall within the operations unit if hired in the future. While the practice of the Board is not to exclude non-existent classifications this practice does not extend to refusing to exclude a non-existent generic group such as office and clerical which the Board accepts *prima facie* as having a separate community of interest. Accordingly, the Board hereby finds that all employees of the Fergus District Ambulance Service operating out of Fergus, save and except operations manager, persons above that rank, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

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7. A certificate will issue to the applicant.

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**0658-79-U Ontario Nurses' Association, (Applicant), v. The Grey-Owen Sound Health Unit, (Respondent).**

**Arbitration – Duty to Bargain in Good Faith – Lock Out – Strike – Subsequent interest arbitration imposed by section 34c award – Whether eliminating right to lock-out/strike – Whether interest arbitration may be perpetual – Attempting to resile from arbitration process – Whether breaching duty to bargain in good faith.**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members D. B. Archer and R. W. Redford

**APPEARANCES:** *Donald F. Hersey and Dan Anderson for the applicant; John H. E. Middlebro and Barbara Crosbie for the respondent.*

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER D.B. ARCHER; August 10, 1979.**

1. This is an application under section 83 of *The Labour Relations Act*. The applicant union contends that on July 4th, 1979 the respondent employer unlawfully threatened to lock out its employees. The union argues that the existence of an on-going process of interest arbitration suspends the right to lock out and renders any purported exercise thereof a breach of the Act, for which this Board can grant relief. The respondent admits that it



threatened a lock-out, but contends that the threat was legal because it has complied with all of the statutory pre-conditions for a lawful lock-out. This application is the latest skirmish in a protracted legal battle which has already made its way on one occasion to the Ontario Court of Appeal (see: *Grey-Owen Sound Health Unit v. Ontario Nurses' Association*, February 5th, 1979, as yet unreported). The respondent's lock-out threat (which, we are advised, has now matured into an actual lock-out) occurred despite a finding by that Court that the parties could be lawfully required to submit to binding arbitration to settle their current bargaining dispute.

2. The applicant and the respondent are respectively the bargaining agent and employer of a number of public health nurses. The collective bargaining relationship between the parties is governed by *The Labour Relations Act*. Unlike nurses employed in nursing homes or public hospitals, public health nurses have the right to strike, and their employer has the concomitant right to lock them out. The Legislature has not chosen to compel either party to resort to compulsory "interest" arbitration for the resolution of their collective bargaining disputes. This is not to say that the Legislature approves of industrial conflict; it is merely that conflict has not been regarded as inherently contrary to public policy, and has not been absolutely prohibited.

3. For some years public health nurses and their employers have voluntarily chosen to submit their differences to third party adjudication rather than resort to a strike or a lock-out. In recent years, however, employers have become dissatisfied with interest arbitration and, in particular, with the awards which, in their view, are too generous or give insufficient consideration to the economic constraints under which the boards now operate. As counsel for the respondent put it: the members of the Board of Health are no longer willing to have a significant component of their budget, or their spending priorities, determined by "an outsider." They believe it is their own responsibility to manage and disperse public funds. The applicant, on the other hand, is anxious to maintain the arbitration system – undoubtedly because it believes that its members are better off than they would be if their wages were subjected entirely to the vicissitudes of free collective bargaining. Each of these positions is perfectly reasonable in light of the parties' divergent objectives and, in setting out their tactical considerations, we should not be taken as approving or condemning either position. The propriety of the respondent's conduct does not depend upon our approval, nor can we impose our notions of fairness upon trade unions or employers. We have no mandate to redress what we might consider to be an imbalance of bargaining power. The parties are free to fashion their own bargain, in their own way, provided they comply with *The Labour Relations Act*.

4. The basic facts are not in dispute. The parties were bound by a collective agreement for the period January 1, 1975 to December 31, 1975 (the "1975 agreement"). This was the last jointly negotiated collective agreement between them, and expired on December 31, 1975 in accordance with its terms. For some months the parties sought to negotiate the terms of their 1976 agreement. On February 13, 1976 the union requested the assistance of a conciliation officer, and on April 9, 1976 both parties agreed to submit their remaining differences to an arbitration board established pursuant to section 34c of *The Labour Relations Act*. One of these matters in dispute was the insertion of a clause in the 1976 agreement which would provide for interest arbitration as a means of resolving the next agreement. This board was empowered to establish the rest of the terms of the 1976 agreement and on October 1, 1976 it issued its award. It is this award which gave rise to the litigation already

mentioned. As it turned out it was not until *July 6, 1979* that the board of arbitration issued a final award. It appears that the parties have not yet executed a formal “1976” collective agreement, nor has there been any agreement covering any subsequent year.

5. As part of the 1976 package, the board of arbitration included a provision requiring resort to interest arbitration as the means of determining the contents of the next agreement. It was this aspect of the award which concerned the respondent, and it was this aspect which was considered by the Divisional Court and eventually the Court of Appeal. The Court of Appeal quashed a portion of this award and referred the matter back to the board of arbitration for further consideration; but the Court also indicated that the board could include in the 1976 agreement an interest arbitration clause referable to the next agreement, but not extending beyond that agreement. The issue raised in this application is how this arbitration process affects the right to strike or lock out. None of the Court decisions expressly address this point.

6. While the parties were litigating their dispute concerning the 1976 agreement, they were also attempting to negotiate their 1977 agreement. Notice to bargain was given by the employer on December 20, 1976. Of course, the two processes were not unconnected, for if the union were successful in the courts, and unsuccessful at the bargaining table, it could ultimately resort to arbitration to determine the new agreement. The delays in the litigation process affected the bargaining, and it was not until July 20, 1978 that the union applied for conciliation in respect of the new round of negotiations. Conciliation ultimately proved to be unsuccessful, and on October 13, 1978 the Minister of Labour issued a “no board” report. On September 28, 1978 the respondent gave notice, pursuant to section 44(2) of *The Labour Relations Act*, terminating anything which might be construed as a continuation or extension of the 1976 agreement, or a “bridge agreement” between the 1976 and 1977 agreement. On October 5, 1978, (i.e., after receipt, but before the expiry, of the 30-day notice allegedly given pursuant to section 44, and before the issuance of the no board report) the union sought to establish an interest arbitration board with respect to the 1977 negotiations, by notifying the employer of its nominee. This notice, it will be observed, was made in accordance with an arbitration award which the Court subsequently quashed in part. Since the revised award was only received on July 12, 1979, no notice to arbitrate has been given pursuant to the new award, nor has a board of arbitration yet been constituted. It bears repeating that this second round of arbitration flows directly from the first round, and that the first round purported only to establish an agreement for 1976 – albeit with certain terms referable to the making of a subsequent agreement.

7. Section 63(2) of *The Labour Relations Act* provides as follows:

“Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 3 of section 102 to have re-



leased to the parties a notice that he does not consider it advisable to appoint a conciliation board.”

The employer contends that by July 4, 1979, it had complied with all of the requirements for a lawful lock-out set out in 63(2). There is no collective agreement in existence, the Minister has advised the parties that he does not consider it advisable to appoint a conciliation board, and the requisite period of time has passed. The employer submits that the obligations contained in the 1976 agreement are of no force and effect in 1979 since the employer has exercised its right under section 44(2) of the Act to terminate any extension of the 1976 agreement and, in any event, such extension could not continue beyond one year (see section 44(2).) The employer relies upon the amendment to section 44(2) added in 1975 which was designed to ensure that an extension of a previous collective agreement could not indefinitely suspend the right to strike. Section 70, argues the employer, “freezes” the terms of the old agreement; but it is implicit in section 70 that once the “freeze” expires the parties need not continue to adhere to those terms. The employer contends that it is now free to vary or revoke the right to interest arbitration, just as it could vary the wages, or revoke the right to “rights” arbitration previously required by section 37 of the Act, and embodied in the old agreement. The interest arbitration clause has no “special status” which keeps it “alive” long after other clauses have expired, or makes it immune from the possibility of revocation contemplated by section 70.

8. With respect to the decision of the Court of Appeal the employer points to the remarks of Wilson, J.A., to the absence of any clear statement from the Court prohibiting a strike or lock-out, and to the absence of any discussion of a statutory underpinning which both guarantees enforceability *and* prevents the accrual of the right to strike when the agreement preserved by sections 70 and/or 44(2) has expired, and the conciliation process completed. The employer’s position is that the Court did not intend the interest arbitration clause to be “binding” in any absolute sense or stand on a better footing than any other term of the collective agreement. The Court meant only that if the parties could have such a term in their agreement, the arbitrator could put one in too. The arbitration provision would be as “binding” and enforceable as any other clause in the collective agreement, but would be subject to the same limitations *vis-a-vis* section 70 and 44(2) as any other clause. The arbitrator could do no more than the parties themselves. If they could not in their collective agreement create an enforceable interest arbitration process and an indefinite extension of the agreement for the purposes of barring the right to strike/lock-out, then neither could the arbitrator. Alternatively, the employer contends that the existence of an arbitration process, even if ultimately binding, does not suspend the right to resort to conciliation and a lock-out. Only a collective agreement or section 34c can suspend these rights and, in the present case, the “second round” of arbitration is based upon neither. Finally, the employer points out that it is incongruous that an arbitration process which might only determine a “1977” agreement, should suspend statutory rights in 1979-80. In the employer’s view, interest arbitration, apart from section 34c of the Act (and then only for “one round”) is entirely inconsistent with the scheme of the Act, and the “free” collective bargaining process.

9. The union maintains that the Court of Appeal upheld the arbitrator’s right to prescribe a second round of “binding” arbitration. The Union submits that the employer’s lock-out threat, and subsequent lock-out, is therefore illegal, and in defiance of the clear intention of the Court. It is implicit in the court decision, argues the union, that the right to



lock-out has been suspended during the arbitration process. If this were not the case, the entire process would be undermined. It is inconceivable, submits the union, that the Court could have intended that the parties could engage in a protracted strike or lock-out, at the same time as they are engaging in a binding arbitration process which will ultimately result in a new agreement. The union contends that this process of interest arbitration is not inconsistent with scheme of the Act.

## II

10. *The Labour Relations Act* establishes a scheme of compulsory collective bargaining, but it does not compel the parties to reach agreement, nor does it prevent either party from resorting to economic pressure to resolve a bargaining impasse. Indeed, economic pressure is an integral part of the bargaining process, for it is the possibility of economic loss which prompts both sides to moderate their positions and reach a mutually acceptable compromise. The degree of economic pressure which a party can mobilize will ultimately depend on the supply and demand for labour. Despite the "collective" nature of the process, the terms and conditions of employment will reflect the prevailing market forces where the right to resort to economic power is preserved. A regime of collective bargaining may channel or weaken these labour market pressures, but the influence is preserved to a considerable extent.

11. Before industrial conflict is lawful, the parties must resort to at least one stage of compulsory conciliation. Sections 15-18 of *The Labour Relations Act* require the Minister of Labour to appoint a conciliation officer upon the request of either party and promptly advise the parties if he does not intend to appoint a conciliation board. After this "no board report" is released, and sixteen days have elapsed, the parties are free to resort to a strike or lock-out.

12. Once the parties have concluded a collective agreement they remain bound by its obligations for the duration of its term of operation, and the common law relationship of master and servant ceases to be relevant. (See: *McGavin Toastmaster Ltd. v. Ainscough et al*, (1975), 54 D.L.R. (3d) 1 (S.C.C.) There can be no strike or lock-out during the currency of a collective agreement. The agreement must be for a specific term of at least one year. The term must be specific and readily ascertainable on the face of the agreement, because the employees' right to terminate bargaining rights or change bargaining agents can only be exercised during certain "open periods" calculated with reference to the term of the agreement. (See sections 5 and 49) Unless the agreement otherwise provides, notice to bargain for its renewal can be given within 90 days of the nominal expiry date (section 45), and the re-negotiation process proceeds as before with resort to conciliation and economic pressure if the parties so desire.

13. In *C.P.R. v. Zambri*, (1962), 34 D.L.R. (2d) 654 (S.C.C.) Judson J. observed: "When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship." It is also clear that the parties cannot fall back upon the common law to establish binding contractual obligations between them: *Young v. Canadian Northern Railway*, [1931] A.C. 83 (P.C.) However, the expiry of a collective agreement does not immediately leave the parties in a legal limbo. The Act contemplates that an agreement may expire while the parties are bargaining for a replacement agreement, and before they have settled all of the matters remaining in dispute. Sections 70

and 44(2) both provide ways in which the terms of the relationship can be preserved while the bargaining process continues. These sections read as follows:

“44. – (2) Notwithstanding subsection 1, the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.

70. – (1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, *no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees*, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) *until the Minister has appointed a conciliation officer* or a mediator under this Act, and

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) *fourteen days have elapsed* after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 13, in which case subsection 1 applies, or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 37 applies *mutatis mutandis* thereto.” [Emphasis added]

14. Section 44(2) allows the parties, by mutual agreement, and for a period of less than one year, to continue in force some or all of the terms of their previous agreement while they are bargaining with a view to its renewal. Such continuation or extension agreement can be unilaterally terminated by either party on thirty days’ notice. This qualification, added in 1975, avoids the problems discussed in *Bradburn v. Wentworth Arms Hotel Ltd.*, *infra*, where the courts raised the possibility that an extension agreement might indefinitely postpone the right to strike. It is now clear that, whatever the nominal term of an extension agreement, it can be terminated on thirty days’ notice, leaving the parties free to pursue their statutory rights and remedies.

15. Whether or not there is a “continuation” or “extension” agreement, section 70 will automatically freeze the employer-employee relationship, in its entirety, from the expiry of the collective agreement until the conciliation process is completed and the right to strike accrues. Like a 44(2) extension agreement, section 70 stabilizes the parties’ relationship during collective bargaining. Like section 44(2), the section 70 freeze preserves the no-strike prohibition for a period of time, but does not create an absolute bar to the exercise of that right. Once the section 70 freeze is exhausted and the extension agreement (if there is one) is terminated, the parties may engage in lawful industrial conflict. The employer also becomes entitled to alter any of the terms and conditions of employment formerly contained in the collective agreement. There remains only a statutory bargaining and employer-employee relationship. Subject to section 64, an employer may even hire replacements, although he cannot terminate his employees simply because they are exercising their right to strike. (See *C.P.R. v. Zambri*, *supra*)

16. Nothing in the Act prevents the parties from *signing a collective agreement whose terms will be determined by arbitration*. Nothing prevents the parties from submitting their dispute to arbitration under section 34c – which explicitly contemplates this process. Moreover, nothing in the Act renders other schemes “illegal”. Neither a “non 34c agreement” to resort to arbitration, nor a provision in a collective agreement that the next agreement will be resolved by arbitration, are “illegal” simply because these possibilities are not expressly contemplated in the statute. Such alternatives to industrial conflict may be commendable and even desirable. The question, however, is whether, and how, such provisions can be enforced should one party choose to repudiate their agreement and revert to the statutory conciliation/strike process. The simplicity or industrial relations value of a procedure does not guarantee its legal basis.

17. In light of the foregoing, it is easy to see the utility of a provision such as section 34c. That section is the only one which deals directly with interest arbitration. It provides as follows:



“(1) Notwithstanding any other provision of this Act, the parties may at any time following the giving of notice of desire to bargain under section 13 or 45, irrevocably agree in writing to refer all matters remaining in dispute between them to an arbitrator or a board of arbitration for final and binding arbitration.

(2) The agreement to arbitrate shall supercede all other dispute settlement provisions of this Act, including those provisions relating to conciliation, mediation, strike or lockout, and the provisions of subsections 6, 7, 9, 10 and 11 of section 37 apply mutatis mutandis to the proceedings before the arbitrator or board of arbitration and to its decision under this section.

(3) For the purposes of section 53 and section 112, an irrevocable agreement in writing referred to in subsection 1 shall have the same effect as a collective agreement.”

Section 34c(1) makes it clear that the parties may refer matters to an arbitrator for final and binding determination. Section 34c(2) makes the award binding by incorporating section 37(10). Equally important, section 34c(2) explicitly suspends the right to resort to a strike or lockout. The section does not contemplate the coexistence of a conciliation/strike route, and a parallel arbitration route. Parties under 34c must irrevocably choose one or the other, and their options under 34c are much more restricted than, for example, under 44(2), which permits them to continue their old agreement in operation by means of an extension provision “in a collective agreement, or otherwise and before or after the collective agreement has ceased to operate.” By contrast, a 34c arbitration agreement can *only* be made *following* the giving of notice to bargain under section 13 (a first agreement situation) or 45 (a situation where there has been a previous collective agreement). Section 34c provides no support for any arbitration agreement concluded *prior* to notice to bargain, or contained in a pre-existing collective agreement. The legislature could have provided a clear statutory basis for these other kinds of arbitration agreement, by adopting language similar to that of section 44(2) – a section which first appeared in its present form, in July 1975, in the same package of amendments that included section 34c. The Legislature did not do so.

19. Section 34c is a mechanism for resolving an existing impasse which the parties have reached in their bargaining. It is a provision for the *voluntary* arbitration of *current* disputes founded upon the agreement of the parties – albeit an agreement which, once made, is irrevocable and suspends pre-existing statutory rights. It was clearly recognized by this Board in *Haldimand Norfolk Regional Health Unit* [1978] OLRB Rep. Feb. 197, and by Wilson J.A. in *Grey-Owen Sound*, *supra*, that neither the parties, nor a “34c arbitrator” can prescribe a second round of “34c arbitration”. The mutual agreement required to trigger section 34c must come about *following* the giving of notice to bargain. A timely section 34c agreement to go to arbitration cannot be created artificially or implied from any pre-existing arrangement. In particular, it cannot be “deemed” because of a provision in a collective agreement. Section 34c involves the waiver of the right to strike and lockout, which are an integral part of the statutory scheme of collective bargaining in this province. In the circumstances, there must be strict adherence to the requirements of section 34c. It follows that in the present case, the second round of interest arbitration which the union claims suspends the right to lock-out is not a “section 34c interest arbitration”. The applicant cannot, there-

fore, rely directly upon the provisions of section 34c(2) to remove the employer's right to lock-out. Moreover, we are satisfied that there is at the present time no collective agreement in existence and that the employer has complied with the pre-conditions for a lawful lock-out set out in section 63(2) of the Act. If there is a restriction on the right to lock-out it must be found elsewhere in the Act.

20. In analyzing the problem, we must be careful to distinguish the jurisdiction of this Board from that of the Courts. The arbitration process in this case emanates from a section 34c award. Section 34c incorporates, by reference, section 37(10) which permits the filing of the award in the Supreme Court and its enforcement as if it were a judgment or order of that Court. Since the 34c arbitrator ordered resort to a second round of arbitration, and the Court held that he could lawfully do so, the failure to comply with the process could be said to be a breach of the first round award, for which a remedy could be sought in the courts. It would be for the courts to determine whether there has been a breach of the arbitrator's award, whether the award operated to suspend the right to strike, or if the strike/lock-out route and arbitration can legally co-exist.

21. Nevertheless, the availability of an alternative enforcement procedure does not mean that this Board has no jurisdiction; nor, if there is an alternative basis for our jurisdiction, must we refuse to exercise it, simply because a party may also have a similar remedy in another forum. In our view section 14 of the Act provides us with a basis for disposing of the present application, and for the reasons given by McRuer, C.J.H.C., in *R. v. OLRB ex p. Genaire Ltd.*, [1958] O.R. 637, we do not think we should refuse to exercise that jurisdiction simply because the applicant has not pleaded section 14 in its formal application. It would make little sense to dismiss the present application only to have the applicant subsequently re-apply for the identical relief.

### III

22. Section 14 of the Act requires the parties to bargain in good faith and make every reasonable effort to make a collective agreement. Usually such an agreement will be reached through bargaining, and there is normally no conflict between the "duty to bargain" and the right to resort to economic sanctions. Section 34c provides an alternative method of resolving disputes, which substitutes arbitration for negotiation, and suspends the right to resort to a strike or lockout. However, the adoption of this alternative method of reaching a collective agreement does not mean that section 14 is entirely irrelevant. It continues to regulate the conduct of the parties' relationship, even though the character of that relationship will be somewhat different. If, as in the present case, a party has irrevocably consented to a 34c arbitration, *and has specifically clothed the arbitrator with the authority to prescribe a second round of arbitration*, section 14 prevents it from revoking its agreement and engaging in economic conflict in total disregard of its previous undertaking. Section 14 requires both parties to bargain subject to any limitation to which they have previously voluntarily committed themselves. If a party attempts to renege, or withdraw from its agreement, it is breaching its duty to bargain in good faith. Indeed, can there be any clearer example of "bad faith" than an attempt to undermine or repudiate a commitment voluntarily undertaken and relied upon by the other party? A breach of section 14 can be remedied by this Board, and our jurisdiction to grant relief operates in addition to any remedy which may be available in the courts.

23. The application of section 14 in the present case does not fundamentally alter the consensual nature of the bargaining process; it merely compels the parties to adhere to the procedure to which they have agreed. Whether a collective agreement results from bilateral negotiations, or a jointly agreed arbitration process, consent remains an essential element. In the absence of a *clear* and *specific* undertaking by the parties to proceed to arbitration (or, as in the present case, to specifically submit the possibility of a second round of arbitration to the arbitrator for his determination) there could be no bad faith if a party chose to pursue its other statutory rights. To support a successful claim of bargaining in bad faith there must be a specific, unequivocal and voluntary agreement to adhere to a particular mode of bargaining. It must be clear that a party is attempting to resile from, or vitiate, a consensual agreement. Such consent cannot be implied or created synthetically, no more than can the consent necessary to trigger section 34c in the first instance. It follows that section 14 cannot be used to sustain a perpetual waiver of the right to strike/lock out simply because the parties have on one occasion chosen to set in motion a round of arbitration. One should not readily infer consent to proceed to arbitration for subsequent collective agreements. This is the approach taken by Estey, J. in *Bradburn v. Wentworth Arms Hotel Ltd.*, [1978] S.C.R. 846 (and by Arnup, J.A. in *Grey-Owen Sound*, *supra*). At page 861 Estey J. remarked:

“It would take the clearest possible language in my view to drive a court to an interpretation which would find the parties voluntarily stripping themselves of the opportunity to call to their aid the provisions of the statute to change a collective agreement, and to substitute for those proceedings so traditional now in the labour relations of our community, a permanent agreement continuing until both parties agree upon a replacement agreement.”

And at pp. 858-859 he noted:

“There are serious consequences for the participants in the field of labour relations were a court to construe the provisions of *The Labour Relations Act* and the collective agreement in such circumstances as now before us, in such a way as to cause the establishment of a perpetual collective agreement terminable only on the execution of a new collective agreement by the parties. Where not barred by the statute the parties of course can, by unambiguous language, bring about the results which others might consider to be improvident. In such circumstances the courts may not properly interfere. The scheme of labour relations under the Ontario Act is founded upon collective bargaining leading to a collective agreement and thereafter to replacement agreements. Collective bargaining in turn is an activity in which the parties participate in the full realization of their respective economic positions and strength subject only to the limitations and boundaries imposed on the parties by *The Labour Relations Act*. Consequently, collective agreements, which are of course creatures of statute finding both their origin and their extent within the Act reflect these realities. A court therefore should not be quick to place a meaning on a term of a collective agreement which would put that clause in conflict with the general philosophy of labour relations under the applicable statute. Such should be the



case only where the contract by its clearest intent and provisions dictates otherwise. I do not find that to be the case here.”

The court in *Wentworth Arms* was dealing with the possibility of a perpetual collective agreement, but in our view, their cautious approach is equally applicable to a potentially perpetual arbitration process. We have considerable doubt whether a perpetual waiver of the right to strike and a permanent compulsory arbitration process can be achieved without legislation; but, in any event, it cannot be founded upon breaches of section 14. This conclusion does not prevent resort to section 14 to give effect to *consensual* “non-section 34c” arbitration agreements which lawfully emanate from a *consensual* reference to arbitration under 34c of the issue of continued arbitration. It simply means that a party cannot be said to be bargaining in bad faith if it refuses to adhere to an agreement or arrangement to which it has not previously consented.

24. Section 14 permits the parties to *voluntarily construct* binding alternatives to industrial conflict suitable to their own needs. While a party is not forced to abandon its right to resort to the conciliation/strike route, there is no reason why it should not be entitled voluntarily to do so, and, once having voluntarily committed itself, be prevented, except perhaps in exceptional circumstances, from reneging on its bargain. *The Labour Relations Act* need not be viewed as a straitjacket which precludes collective bargaining innovations. And, stripped of its legal complexity, is there anything unusual in a finding that once a party has *voluntarily* committed itself to a mode of bargaining it will be acting in bad faith if it subsequently repudiates the agreement? We do not think so, nor do we think such finding makes section 34c redundant. Section 34c(3), for example, prevents a termination of bargaining rights. This bar may not be available if one pursues other alternatives. In addition, it may be significant that the Board’s authority to interpret and apply section 14 was created at the same time as 34c itself. Both amendments were made in 1975. The jurisprudence was then undeveloped. We do not think it was intended that 34c limit the general language of section 14.

25. Having carefully reviewed the decision of the Court of Appeal in *Grey-Owen Sound, supra*, we do not find anything which undermines or contradicts the view which we have taken. On the contrary, our view is entirely consistent with the result which the Court reached and involves neither a perpetual waiver of the right to strike/lock out, nor the co-existence of two incompatible methods of resolving the current collective bargaining dispute. We do not think that in dealing with the jurisdiction of an arbitrator under section 34c of the Act the Court intended to circumscribe the authority of the Board to interpret and apply section 14 of the Act. We find no support for such restriction in any of the decisions of the learned judges.

26. The final matter which we must address involves the reference to arbitration which, as we have already noted, was made pursuant to an arbitration award which was subsequently quashed. We are by no means certain that the Court intended to quash that part of the arbitration process which provides the applicant’s right to refer (see: reasons of Arnup, J.A.) but even if it did so, we do not think the respondent can, with impunity, take advantage of the short hiatus between the Court decision and a final award to ignore the arbitration process and engage in industrial conflict. The process was properly triggered in the first instance and we do not consider that the respondent can avoid its obligation to adhere to it. In any case, once the final award was issued, it would appear to “feed back” into the

1976 agreement and make the second round available in any event. In view of the decision which we have reached with respect to section 14, we do not think anything turns on the fact that the second round of arbitration may not have been triggered by the union's earlier notice and that a new notice is now required. The employer is still prohibited from engaging in a lock out when the union has unequivocally indicated its intention to proceed to arbitration in accordance with the parties' agreement.

27. For all of these reasons, we find that the respondent's attempt to repudiate its own commitment to go to arbitration is a breach of the section 14 duty to bargain in good faith. We accordingly order that the respondent forthwith cease and desist from threatening or engaging in a lock out and comply with the arbitration process which the Court of Appeal has held was lawfully prescribed.

#### **DECISION OF BOARD MEMBER R. W. REDFORD:**

1. The majority of the Board has found that, notwithstanding the issuance of a "No Board Report" by the Minister of Labour on October 13, 1978, the lockout threatened on July 4, 1979 was unlawful. The majority of the Board found that the conditions precedent for a lawful lockout pursuant to section 63 of *The Labour Relations Act* had been met, yet concluded that the actions of the employer in this case were unlawful as being in breach of section 14 of the Act. I disagree with that conclusion.

2. The majority has set out the relevant facts and I need not repeat them. What is significant, in my view, is that the lockout with which we are concerned is referable to the negotiations for the renewal of a collective agreement that was first imposed by a board of arbitration established under section 34c of the Act. Section 34c makes it clear that resort to a lockout or a strike after agreeing to submit outstanding issues to arbitration pursuant to that section is unlawful. The arbitration process which the applicant seeks to invoke as a basis for claiming that the lockout is illegal is *not* one that arises from an agreement of the parties to which section 34c applies, but rather is an arbitration procedure *imposed* upon both parties by the first board of arbitration established under section 34c.

3. The litigation arising out of the first arbitration board's award had already passed through Divisional Court (Divisional Court judgment dated March 22, 1978, 19 O.R. 2d 271) and was on its way to the Court of Appeal when the union applied for the appointment of a conciliation officer pursuant to section 15 of *The Labour Relations Act*. At that point the union knew that the employer did not wish to continue with the resolution of bargaining impasses by resort to arbitration, but rather wanted to revert back to the collective bargaining scheme set out under *The Labour Relations Act*.

4. The union, after having applied for conciliation, and after receiving a "No Board Report" on October 16, 1978, purported to refer the outstanding issues between the parties to arbitration pursuant to an arbitration award, the legal status of which was pending before the court. The employer's position, quite naturally, was that the arbitration imposed by the section 34c board of arbitration for the second round of negotiations was of no force and effect.

5. I am of the view that two parties may by express mutual consent waive their right to resort to the economic sanctions permitted by *The Labour Relations Act*. This is the un-

derstanding of the scheme of *The Labour Relations Act* as set forth by Estey, J. in *Bradburn v. Wentworth Arms Hotel*, 79 CLLC ¶14,189, where the Supreme Court of Canada determined that although the parties to a collective agreement can voluntarily give up their right to strike, neither arbitrators nor labour relations boards, nor the courts, should interpret an agreement as waiving the parties' rights under *The Labour Relations Act* unless they are compelled to do so by the clearest possible terms.

6. As the majority of the Board notes in this case, the scheme of the Act envisages the parties in negotiations "resorting to economic pressure to resolve a bargaining impasse. Indeed, economic pressure is an integral part of the bargaining process, for it is the possibility of economic loss which prompts both sides to moderate their positions and reach a mutually acceptable compromise". I agree with the majority's view that the possibility of resort to economic sanctions is an integral part of *The Labour Relations Act*. It is for this reason that I am of the opinion that the Board should not be quick to interpret the Act in a way which appears to be contrary to the scheme of the Act.

7. In this case the union, after negotiations with the employer, applied for conciliation. The employer at that point naturally would have assumed that the union had chosen to proceed under *The Labour Relations Act* and had elected to accept the consequences of so proceeding, including the possibility of a lockout or strike. Therefore, the union should not now be complaining to this Board that the employer has violated the Act by engaging in a lockout and after it was the union which chose to follow the conciliation and strike/lockout route set out in the Act.

8. I agree with the majority of the Board in holding that section 14 of the Act can be used by this Board to enforce an express voluntary agreement to resort to arbitration and which waives the right to strike or lockout. However, such an agreement must be explicit. In this case I am of the opinion that there was no explicit agreement which would permit this Board to interpret the decisions of the courts and of the first arbitration board to find that the employer had in fact given his consent to the arbitration process as the method of resolving collective bargaining impasses following the expiry of the agreement imposed by the board of arbitration established pursuant to section 34c of the Act.

9. The union is coming to this Board for enforcement of an arbitration award issued pursuant to section 34c of *The Labour Relations Act*. The arbitration award did not, nor did the court, state explicitly that the employer was prevented from locking out its employees, and that the employees were prevented from engaging in a strike against their employer. As the majority of the Board has indicated, the waiver of the right to strike is "implicit" in the decisions of the board of arbitration and the court. If it is indeed implicit, this Board should not be constrained to find that such activity is illegal in the face of the express right granted to the parties by the Act.

10. I recognize that the Court of Appeal held that the arbitration board under section 34c may impose arbitration as the method of resolving a collective bargaining impasse during the *next round of negotiations only*. However, that next round of arbitration must be based upon a legal foundation to be enforceable. In my opinion, the only possible legal foundation for the enforcement of the first award is section 34c of the Act which incorporates by reference section 37(10) of the Act. Since it is an arbitration award that purported to remove the right to strike or lockout from the parties, the party affected by the failure to



comply with the arbitration award should seek its remedy in the courts as contemplated by section 34c and section 37(10). In my opinion the court is the only forum with the jurisdiction to resolve the issue of whether the employer in this case had the right to lock out its employees. This Board has the jurisdiction to interpret the Act. Once the Board found that the lockout was timely under the Act, that should have ended the matter. The enforcement of the first award issued by the board of arbitration under section 34c is outside the jurisdiction of this Board and must be dealt with by the courts.

11. In summary, it is my opinion that the scheme of *The Labour Relations Act* contemplates that bargaining to an impasse is a normal event which may occur during collective bargaining. Engaging in a strike or a lockout after the conditions precedent for doing so have been met is a right given by the Act to employees and employers. It is inconsistent with the scheme of the Act to find that an employer or a trade union have implicitly given up their right to strike/lockout during a second round of negotiations by agreeing to resort to arbitration for the resolution of a collective agreement during a first round of negotiations. Furthermore it is inconsistent with the scheme of the Act to hold that an employer implementing an otherwise lawful lockout is bargaining in bad faith when the employer is merely seeking to continue collective bargaining using the dispute resolution mechanism of conciliation, strike/lockout provided by *The Labour Relations Act* which were first triggered by the union.

12. For these reasons I would have dismissed the complaint brought by the union that the employer had engaged in or threatened an unlawful lockout.

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### **0443-79-U Ontario Nurses' Association, Applicant, v. Humber Memorial Hospital, Respondent.**

**Change in Working Conditions – Parking rates increased – Assuming privilege frozen by statute – Board determining nature of privilege.**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members E. C. Went and O. Hodges.

**APPEARANCES:** *Kathleen G. O'Neil, Aileen Sutherland, Larry Robbins, Barbara McCullough, Jewell Oxby and Susan Oliver for the complainant; Brian O'Byrne, Dave Clark and Ian Johnston for the respondent.*

### **DECISION OF THE BOARD; August 14, 1979**

1. The complainant has alleged that the respondent has dealt with certain members of the bargaining unit which the complainant represents contrary to the provisions of section 70 of *The Labour Relations Act* as modified by section 10 of *The Hospital Labour Disputes Arbitration Act*.

2. The parties agree that the statutory freeze period applicable to their circum-

stances commenced October 1, 1978 and was still in effect when this complaint was filed. The complaint, simply put, is that the respondent increased during the freeze period the *per diem* cash charge to employees for use of its parking lots without the consent of the complainant and was, therefore, in violation of the freeze. The charge was increased from 50¢ to 75¢.

3. The facts which are relevant to the disposition of the complaint are straightforward. The respondent employs approximately 1,000 persons of which approximately 200 are in the bargaining unit represented by the complainant. The respondent operates five parking lots, three of which are used by employees and are relevant to this matter. All three lots are controlled by automatic gates and one of them ("lot #1") is for use by employees only who have access by means of magnetic pass cards. A maximum of 240 cards are issued at any one time and at the times relevant to this complaint, some of these cards had been issued to employees in the complainant's bargaining unit. Pass cards are issued to employees only. Employees who do not hold pass cards and who use the respondent's parking lots together with other members of the public, use the other two lots (lot #2 and lot #3) by paying the established coin charge. Employees who hold pass cards may also have access to lot #3 by using their cards, but if they use lot #2 they may do so only by paying the established coin charge. There is no guaranteed space in any of the three lots, it is available to employees and public alike on a first-come, first-served basis, except that lot #1 is not available to the public.

4. Employees who possess pass cards pay for them by deduction of \$3.65 from their bi-weekly pay. While the method of payment has changed, that rate or its equivalent has been in effect since January 1, 1975 and, therefore, was the rate in effect at the commencement of the freeze period on October 1, 1978. This method of payment is not at issue in this complaint; only the coin rate of payment is at issue. The *per diem* coin rate of 50¢ was set by the respondent on January 1, 1975 for use of lot #1 and #3, the only ones then in operation, daily between the hours of 7:00 a.m. and 8:00 p.m. Between 8:00 p.m. and 7:00 a.m., the lots were unattended so no charge was made for their use by anyone. The 50¢ rate was paid by employees and the public. Coin-operated, automatic gates were put into use on July 14, 1975, thus eliminating the "no charge" parking period from 8:00 p.m. to 7:00 a.m. Lot #2 was opened in the spring of 1977 for use by the public and employees at the same *per diem* rate as lot number 3 (i.e. 50¢), with use controlled by coin-operated, automatic gates. On March 30, 1979, by various means, the respondent posted notices of change in this *per diem* rate from 50¢ to 75¢ to be effective from March 31, 1979. The change went into effect as notified without the respondent either seeking or obtaining the consent of the complainant. On June 6th, the complainant filed this complaint. The new rate applies equally to employees and the public who use lots #2 and #3. The charge for pass cards remained at \$3.65 bi-weekly.

5. The respondent has operated one or more parking lots on its property since Hum-ber Memorial Hospital started in 1950. Space in the lots since that time has been for use without guarantee of availability, by employees and the public. There was no charge for use of the space until lot #3 was established in the spring of 1966 when a *per diem* charge of 25¢ was levied by the respondent. This rate increased to 35¢ on January 1, 1970 and was maintained at that rate until January 1, 1975 when the 50¢ rate started. Passes were made available to employees only on a weekly or monthly rate in the spring of 1966 and the rates for these passes were increased, *pro rata* to the *per diem* rate on January 1, 1970 and January 1, 1975.

6. Section 10 of *The Hospital Labour Disputes Arbitration Act* provides as follows:

“Notwithstanding subsection 1 of section 70 of *The Labour Relations Act*, where notice has been given under section 13 or 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.”

The Board has commented in many decisions about the effect, scope and purpose of the “freeze period” created by this section or its counter part in *The Labour Relations Act*, section 70(1). The scope of the statutory freeze has been found to extend to the full working relationship between the parties to collective bargaining so as to provide a stable point of departure from which bargaining can take place. The Board has also found a variety of situations within the working relationship to be a “privilege” within the meaning of the sections, including in the *Scarborough Centenary Hospital* case, *infra*, parking arrangements for employees. In this respect see *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479; *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859; and *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679.

7. The parties in the instant case are at issue over whether the use of the respondent’s parking lots by employees for a *per diem* cash charge is a privilege within the meaning of section 10 and section 70. Assuming, without finding, that these parking arrangements are a privilege, there is the further question of “What is the privilege?”. It is a privilege of using available parking space at the daily rate of 50¢ which was in effect when the freeze period started, as the complainant submits? Or is the privilege (although the respondent denies there is in fact a privilege) one of using parking space under terms and conditions which apply equally to employees and the public, as the respondent submits?

8. On the evidence, the Board finds that the terms and conditions under which the employees who may be affected by this complaint have use of the respondent’s parking facilities including use of the available space at the same rate as is charged to the public; i.e., a “going rate”, and not at a *per diem* rate of 50¢. Therefore, even if the Board were to find this use to be a privilege under section 10 and section 70 of the respective statutes (and it makes no finding either way), the respondent would not be in violation of these sections because it is continuing to charge the employees the public or going rate.

9. In the result, the complaint is dismissed.



**0775-79-U; 0776-79-U** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant), v. **Laidlaw Transportation Limited**, Michael DeGroot and Doug Gowland, (Respondents).

**Practice and Procedure – Request for withdrawal made at hearing – No opportunity to cancel hearing and notify other parties – application dismissed.**

**BEFORE:** E. Norris Davis, Vice Chairman, and Board Members C. A. Ballentine and F. W. Murray.

**APPEARANCES:** *L. Maureen Kenny for the applicant; C. E. Humphrey, M. DeGroot and D. Gowland for the respondent.*

**DECISION OF THE BOARD;** Aug. 24, 1979.

1. At the hearing and prior to the calling of evidence, the applicant requested leave of the Board to withdraw the application based on an unexpected non-availability of witnesses. The respondent opposed the request and moved for the dismissal of the applications.

2. The Board was of the opinion that the request for leave to withdraw, not having been made at a time which would permit the Board to cancel the hearing and notify the other party, should be denied.

3. The applications are dismissed.

**0417-79-U** Laurentian University Faculty Association, (Complainant), v. **Laurentian University of Sudbury**, (Respondent).

**Change in Working Conditions – Tenure revoked during freeze – Never revoked previously – Libel suit against students threatened – University faced with novel situation – Tenure revocation violation of section 70**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members D. B. Archer and F. W. Murray

**APPEARANCES:** *Donald Kuyek, Roy Kari and Louise Thirion Nordstrom for the complainant; Hubert D. Bray for the respondent.*

## DECISION OF THE BOARD; August 24, 1979

1. This is an application under section 79 of *The Labour Relations Act* alleging a breach of section 70. Section 70 provides as follows:

“ – (1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 13, in which case subsection 1 applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.”

2. On November 27, 1978 the complainant trade union applied for certification as bargaining agent for a unit of the respondent's employees. The application was processed in accordance with the Board's usual procedure, a representation vote was held, and on July 9th, 1979 a certificate issued. The alleged breach of section 70 arises from the respondent's decision to reconsider, and revoke, the “tenure” of Louise Thirion Nordstrom (the “grievor”) and thereby bring about a termination of her employment. There is no dispute that the conduct of which the grievor complains occurred within the time frame to which section 70 applies. The respondent contends, however, that there has been no breach of section 70.

3. “Tenure” in the university context means the right to continued employment unless there is sufficient cause for discharge – that is: redundancy, incompetence, seriously unprofessional behaviour, or persistent neglect of duties. The concept of tenure is not unique to the university community; it is also applicable in the case of certain other professionals (judges, for example) who are required to exercise an independent and critical judgment, and in so doing, may incur the displeasure of powerful individuals and groups. Tenure ensures that an individual’s economic security cannot be threatened because he expresses views which might be unpopular, or takes a position of which his employer disapproves, but which does not interfere with his ability to fulfill his professional responsibilities. Tenure has traditionally provided an important safeguard for academic freedom, but in recent years it has served the equally important purpose of protecting faculty members against discharge for reasons which are wholly unrelated to their intellectual or teaching abilities.

4. The significance of tenure in the university community cannot be over emphasized. The granting of tenure is synonymous with the achievement of full membership status within that community, and only occurs after a long and careful assessment of the candidate’s abilities. The granting of tenure fundamentally alters the status of a faculty member. Anything which erodes the privileges and protections associated with tenure is of serious concern to all university professors.

5. The respondent’s practice with respect to academic freedom and tenure is reproduced in a faculty handbook (which is distributed to all faculty members) and is modified, and updated, from time to time in accordance with an ongoing process of discussion among the various “estates” in the academic community. The faculty handbook sets out the respondent’s policies with respect to terms and conditions of employment (teaching loads, annual vacations, retirement plans, fringe benefits, moving expenses, mortgage loans, etc.) as well as certain other matters which could not be considered “terms and conditions of employment” in the true sense. For the most part, such policies and practices have been specifically ratified by the Board of Governors but, in any event, even in the absence of such specific ratification, these procedures are, in fact, applied. There is no doubt (and it is not denied) that the faculty handbook is intended to accurately record the rights, benefits and privileges of, *inter alia*, faculty members, and that faculty members could reasonably expect that their relationship with the university would be governed in accordance with the procedures set out in the faculty handbook. Indeed, the very purpose of the handbook is to provide a reference so that faculty members can readily ascertain their rights, privileges, duties and obligations. Of course, the handbook does not provide the solution for every problem, or an answer for every question; but it does set out the way in which the university can be expected to function and provides a general framework for the employer/employee relationship. It is not disputed that the university adheres to the policies and practices expressed in the handbook.

6. Professor Roy Kari testified that the provisions of the faculty handbook were referred to in the letters of appointment addressed to faculty members and were, therefore, incorporated by reference into their contracts of employment. It is unnecessary for the Board to make any determination with respect to this legal issue. It suffices to say that the faculty handbook sets out, *in fact*, the manner in which the employer/employee relationship has been conducted and, in particular, the way in which tenure has been acquired and discharges “for cause” have been carried out.



7. The faculty handbook prescribes a series of steps which must be followed before tenure can be granted. This tenure policy was modified in 1978 and, although these modifications have not yet received specific Board of Governors' ratification, they have been generally applied, and the tenure granted in accordance therewith has been ratified by the board. The dismissal for cause procedures contained in the handbook have been specifically ratified by the Board of Governors and they, too, have been applied from time to time. The dismissal procedure involves a quasi-judicial process in which the respondent must positively demonstrate to "an arbitration committee" that it has sufficient cause to justify the discharge of a faculty member. There is nothing in the faculty handbook, or in any other pre-established policy, practice or procedure of the university, which deals with the "revocation of tenure" or the termination of a tenured professor other than as a result of redundancy or "for cause."

8. The Board of Governors of the respondent has never refused to grant tenure to a faculty member whose tenure has been approved by all other bodies which play a role in the tenure granting process. Except in the case of the grievor, the Board of Governors of the respondent has never "revoked" or "reconsidered" the tenure of a faculty member. Except in the case of the grievor, the Board of Governors of the respondent has never ordered a reconsideration of a faculty member's tenure by a new tenure committee, when the original tenure committee had unanimously recommended tenure and that recommendation has been duly ratified. The grievor's is clearly an unusual and exceptional case.

9. The grievor has been employed by the respondent since July, 1974 and, together with about a dozen other employees, applied for tenure in late 1978. The grievor's application was considered first by a "tenure committee" composed of faculty members and students, and chaired by an appropriate dean of faculty, who is responsible for ensuring that a proper evaluation is conducted. The dean sends out the required notices, arranges to get comments from faculty members on the candidates' academic abilities, and prepares a summary of these assessments for the committee's use. The summary can include, or refer to, letters of assessment from students, student course evaluations and evaluations by the colleagues of the candidate in his or her particular department. The dean has the responsibility of ensuring that the committee has sufficient information to make an informed decision – although the dean does not himself vote on whether tenure should be granted. The proceedings are held *in camera*, the committee interviews the candidate and all material is destroyed immediately after the final disposition of the case. There is no transcript of the tenure committee's proceedings, or any permanent record of the matters which were raised or considered.

10. The procedures by which tenure is ratified are rather complex. If the tenure committee recommends that tenure should be granted, its recommendation is forwarded to the Vice President (academic) who conducts a second interview of the candidate. If he has reservations about the way in which the committee has done its work he can ask the committee to reconsider the case. Any subsequent dispute between the Vice President (academic) and the tenure committee can be resolved by the President, who has an independent right to request a further evaluation. A faculty member who received an unfavourable recommendation from the tenure committee has access to an appeal process involving an entirely new tenure committee; however, if the committee and the Vice President (academic) are satisfied that tenure should be granted, the matter is forwarded to the Senate and the Board of Governors. As has already been mentioned, in the nineteen years of the university's existence

the Board of Governors has never refused to ratify the tenure of a candidate who has successfully passed through all other stages of the tenure granting process.

11. The grievor's tenure committee was chaired by Dean Hilldrup. Professor Retkoff-Rojnoff, a member of the committee, testified that the committee considered the grievor's curriculum vitae, the assessments which had been received from her academic colleagues, the material presented by students, the available course evaluations, her record of publication and her community involvement. The meeting unanimously recommended that tenure be granted. This recommendation, together with that of the other tenure committees, was forwarded to Father C. Allaire, the Vice President (academic), who interviewed each of the candidates and was, apparently, satisfied that each had been properly evaluated by the various tenure committees. His favourable report was forwarded to the President and, by a letter dated December 8th, 1978, the President of the university congratulated the grievor upon her acceptance as a permanent member of the faculty. The Senate, however, did not "rubber stamp" the recommendations for tenure, as it had done in the past. On January 8th, 1979 the Senate decided to refer the matter back to the President to ensure that there had been proper student input in the tenure evaluation process. By memorandum dated February 2nd, 1979 Father Allaire advised the Senate that, on the basis of the enquiries he had made of the various deans (in the grievor's case, Dean Hilldrup) he was satisfied that the tenure evaluation committees had properly considered student course evaluations, student opinion and the views of the student members of the committees.

12. In or about February, 1979 an anonymous letter concerning the grievor was circulated to the members of the Senate and to various faculty members. This letter obviously emanated from certain dissatisfied students, but the identity of those students was, at that time, unknown. It is not clear whether this letter had any influence, but on February 15th, 1979 the Senate met again and decided to ratify the tenure of all candidates except the grievor and one other person. With respect to these two individuals, the Senate requested the Vice President (academic) consult the tenure committee to reconsider the matter. This was done, and the tenure committee re-affirmed its decision that the grievor should be granted tenure. This, together with Father Allaire's further assurance that the grievor's case had been thoroughly examined, was put before the Senate on March 15th, 1979 and the Senate ratified the grievor's tenure. On March 23rd, 1979 the tenure of all of the candidates, including the grievor, was ratified by the Board of Governors. Dean Hilldrup, who is a non-voting participant in Board of Governors' meetings, was present at that meeting. There was no evidence that at that meeting, or at any time prior to March 30th, Dean Hilldrup indicated any concern about the grievor's ability, or the tenure proceedings, or the decision of the tenure committee, which he had chaired.

13. The anonymous letter, to which we have already referred, caused the grievor considerable embarrassment since it was widely circulated and, in her view, went well beyond any assessment of her teaching abilities. She believed that the letter made allegations which were false, malicious, would discredit her in the eyes of her colleagues, and might prejudice her prospects for advancement if left unanswered. The grievor had no assurance that the administration of the university would not take this letter into account when considering her candidacy for promotion. When the author(s) of the anonymous letter were ascertained she consulted a solicitor – a course of action which was entirely reasonable in the circumstances. Attendance at a university, after all, does not grant a student immunity from the law of tort and, exercising her right to sue, the grievor was merely exercising the traditional



right of any citizen to seek redress in the courts for an injury which has been sustained. By letter dated March 30th, 1979 the solicitors for the grievor wrote to the various students demanding an unqualified retraction, and an apology, for the statements which had been made. The solicitors advised that unless a suitable retraction was forthcoming, they were instructed to commence legal proceedings to obtain an appropriate remedy for the damages which the grievor had suffered. A copy of this letter was sent to Dean Hilldrup (to whom the original anonymous letter had been addressed) and further copies were circulated to certain faculty members and members of the Senate, whom the grievor thought might have been concerned about the allegations in the original anonymous letter.

14. The grievor's letter did not result in an apology or a "retraction" from the students. On the contrary, the students approached the Board of Governors of the respondent and requested that the university undertake to pay any legal fees which might be incurred in defending the libel action.

15. On April 2nd, 1979 Dean Hilldrup summoned the grievor to his office and advised her that if she did not retract her letter he would convene a meeting of the executive committee of the Board of Governors and see to it that her tenure was "revoked." A revocation, if effective, would inevitably result in the grievor's termination. Professor John Barry, assistant to the President of the university, testified that the grievor was previously "a contract employee" and that if she does not have tenure by the commencement of the academic year she will not be teaching at the university. There is no doubt, therefore, concerning the nature of Dean Hilldrup's threat. If the grievor did not abandon her request for an apology and her libel action he would see that she was discharged. Her continued employment was conditional upon her foregoing her resort to the courts.

16. The grievor refused to accede to Dean Hilldrup's demand. She regarded the matter as one of principle: whether an individual could escape legal responsibility for his comments simply because he was a university student. The grievor took the position that she was entitled to an apology, that she wanted such apology to appear in her personnel files and that, alternatively, that she was prepared to submit the matter to the courts for determination. Arrangements were made so that any examinations or essays written by the students in question would be graded by another professor. It is significant that at this meeting Dean Hilldrup did not express any concern regarding the grievor's ability, her competence or the propriety or thoroughness of any of the proceedings of the tenure committee, which he had chaired. His sole concern was the grievor's intended libel action.

16. On April 17th, 1979 an extraordinary meeting of the executive committee of the Board of Governors was convened to consider the student's request that the Board of Governors underwrite any legal fees associated with the threatened libel action. Thomas Hennessy testified that at this meeting Dean Hilldrup brought to the Board's attention certain "new information" concerning matters which the tenure evaluation committee had not considered. We did not hear complete details of this new information (it not being relevant to our section 70 determination) but Mr. Hennessy did testify that, while this information was new to the Board, at least some of it was previously known by Dean Hilldrup. There was, for example, a student petition from some three years earlier expressing dissatisfaction with the grievor. Hilldrup also advised the Board of Governors that the committee had not considered an examination of the grievor's department which had been conducted in 1975. The uncontradicted evidence of the grievor, however, is that the members of the tenure evalua-



tion committee were aware of both of these matters, and that the 1975 problems had been specifically raised during her interview. Dean Hilldrup did not give evidence. It is difficult to resist the conclusion that his primary concern was the threatened legal action and that this was the major reason for his representations concerning her tenure.

17. On the basis of the “new information” raised by Dean Hilldrup, the Board of Governors decided that the tenure of the grievor should be reconsidered. However, the matter was not referred back to the original tenure committee with instructions to consider such new information. Rather, it was determined to strike a new tenure committee chaired by Dean Hilldrup. This process is roughly analogous to that which would have been followed had the original tenure evaluation committee made a negative evaluation (save that it would appear from the respondent’s policy statement that in such circumstances the new committee cannot contain any members from the previous committee.)

18. The new committee duly convened and summoned the grievor before it in or about June, 1979. The grievor, understandably in the circumstances, appeared before the committee with her solicitor. The committee was not prepared to permit the grievor’s solicitor to be present during the proceedings and adjourned. At the time of the hearing before this Board the committee had not yet reconvened. As has already been pointed out, if this committee does not complete its work by the beginning of the academic year the grievor will not be employed at the university. Furthermore, if the committee decides not to recommend a grant of tenure, the grievor will not be employed – although in this event there will be certain appeal procedures open to her. The grievor’s present status is aptly illustrated by a telephone conversation she had on June 29, 1979 with Dean Hilldrup. He advised her that she was not on the payroll and that she was no longer employed by the university.

19. The respondent takes the position that, despite the Board of Governors’ resolution ratifying the grievor’s tenure, the grievor has not, in fact, ever been granted tenure. The respondent submits that its practice is to confirm the grant of tenure by a letter which, however, does not emanate from the Board of Governors itself but rather, from the President of the University. Moreover, the letter refers to a number of matters including promotion, salary and teaching load – which have nothing to do with the Board of Governors. We are satisfied that the issuance of this letter is a purely administrative matter and is not an integral part of the tenure granting process. We are satisfied that tenure was effectively granted when the Board of Governors, by a resolution, approved it. The appointment letter merely confirms what has already occurred and sets out certain employment conditions which are associated with the faculty member’s position during the next academic year. It is significant that none of the candidates, whose tenure was approved, have received a confirmatory letter – largely, it would appear, because the salary negotiations are still in process. The respondent did not take the position that these other faculty members had not been granted tenure. It is also significant that following the Board of Governors’ ratification of the grievor’s tenure Father Allaire, the Vice President (academic), Professor Barry, the assistant to the President, and even Dean Hilldrup himself, congratulated the grievor on her accomplishment. Whatever might be said about the propriety of the subsequent revocation of the grievor’s tenure, we are satisfied that tenure was granted in the first instance.

20. Both parties were anxious that the Board understand the context in which the present complaint arose, and both led a considerable amount of evidence in this regard. Nevertheless, as the Board pointed out at the hearing, the issue before us is whether there

has been a breach of section 70 of *The Labour Relations Act* not whether the grievor has been treated unjustly. Section 70 does not, *ex facie*, prevent an employer from acting in a manner which we might consider to be unfair and arbitrary.

21. Section 70, read as a whole, manifests a legislative intent to maintain the prior pattern of the employment relationship *in its entirety* while the parties are formalising their collective bargaining relationship or negotiating a collective agreement. This ensures that there will be a fixed basis from which to begin negotiations and preserves the status quo during the bargaining process. The status quo includes not only the existing terms and conditions of employment but also other established benefits which the employees are accustomed to receive and which can, therefore, be considered to be "privileges." It is clear that expressed promises, or a consistent pattern of employer conduct, can give rise to such privileges and they will be caught by the statutory freeze. As the Board noted in *St. Mary's Hospital*, Board File No. 1795-78-U (released March 30th, 1979, as yet unreported):

"Section 70(2) preserves not only the employees' terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term "privilege" is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a "right." In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case, since privileges can arise from established custom, practice or policy. The question is an evidentiary one for, by definition, the Board's consideration must go beyond the strictly legal incidents of the relationship ('rights') and include those aspects of the relationship which give rise to 'privileges.'

In order to demonstrate the existence of a privilege, it is not necessary to establish a contractual right, a formal written policy, or an express promise. It is sufficient if there is an established, and well entrenched, course of conduct which gives rise to the reasonable expectation that a benefit, previously given, will be continued."

22. Section 70 is not a strait jacket which prevents an employer from responding to changing business conditions; it merely requires *both parties* to maintain the existing pattern of their employment relationship; that is, to conduct their relationship "as before." In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, the Board discussed the effect of section 70 in the following way:

"The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by

the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.”

In *Spar* the Board decided that the practice of granting annual merit evaluation and increases was sufficiently well entrenched as to become a benefit, which the employees reasonably expected to receive and was, therefore, a “privilege” within the meaning of section 70 of the Act. In *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679, the Board found that section 70 prevented an employer from revoking the privileges of free parking during the currency of the freeze. On the other hand, in *AES Data Limited*, [1979] OLRB Rep. May 368, the Board found that the employer was entitled to re-assign job functions since, in that case, the subject employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. A similar conclusion was reached in *Scarborough Centenary Hospital Association*, [1969] OLRB Rep. Jan. 1049, where the Board reaffirmed an employer’s right to make ordinary business and production decisions, i.e., to conduct its business as before. Finally, in *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, the Board held that a union which had waived certain rights under its collective agreement could not adopt a different posture during a statutory freeze and insist upon compliance. Section 70 requires the Board to determine the pre-existing rights, privileges and duties of the parties, and then consider whether the conduct complained of alters those rights, privileges or obligations.

23. What, then, is the situation in the present case? Can it be said that the respondent has altered the “status quo” contrary to section 70? The respondent submits that it was reacting to a novel situation which was not contemplated by any of its established policies or procedures. The respondent admits that in the years since the university was established the Board of Governors has never reconsidered or revoked a faculty member’s tenure, or established a new tenure evaluation committee after the original committee has twice reaffirmed its recommendation for tenure, and this decision had subsequently been ratified. The respondent submits that because of the novel circumstances of the case, there is no established right or privilege “frozen” by section 70 – even though the procedure set in motion could well result in the grievor’s termination. The union contends that there has been a fundamental alteration in the right or privileges of all faculty members – not just the grievor – for the respondent has constructed a mechanism for calling tenure into question which could bring about the termination of a tenured professor. This, the union suggests, is entirely inconsistent with the established dismissal mechanism in which the respondent would be required to demonstrate adequate cause to an arbitration committee, composed of nominees of the parties and a neutral chairman (the Chief Justice of Ontario or his nominee.) The applicant argues that the established procedure respecting dismissals would be a meaningless safeguard if the respondent were permitted to reconsider and revoke a faculty member’s tenure, since that procedure is only available to a tenured faculty member. The applicant points to the context in which the dismissal procedure is found. It comprises Part III of the policy statement on academic freedom and tenure, immediately followed by the provisions respecting the acquisition of tenure, and is obviously intended to be an integral part of the process. The policy statement suggests that once tenure is acquired termination can only



be brought about in accordance with the dismissal procedure. And, before the grievor's case arose, this was the route which was always followed.

24. Having carefully considered the evidence and representations of the parties, we are satisfied that the purported revocation and reconsideration of the grievor's tenure is an alteration of her "rights or privileges" and is, accordingly, a breach of section 70 of the Act. It has been a well established part of the employment relationship for faculty members at Laurentian University that once tenure has been properly granted their employment is secure unless their position becomes redundant or the university has proper cause for termination. It is no surprise that the policy manual does not contemplate that a tenure, once granted, can afterwards be revoked or reconsidered by a decision of the Board of Governors. This has never been a part of the employment relationship. On the contrary, the termination of tenured staff, other than for reasons of redundancy, has always been accomplished in accordance with the termination for cause procedure set out in the faculty handbook. This procedure would be entirely vitiated if a termination of a tenured faculty member could be accomplished by a simple resolution of the Board of Governors revoking its previous decision to grant tenure. As counsel for the complainant correctly pointed out, it would make the whole concept of tenure meaningless if tenure could be revoked or reconsidered at the instance of the Board of Governors on the advice of a senior administrator. We are satisfied that the process for acquiring tenure, and the procedure respecting termination, are important employee rights or privileges which cannot be revoked during the freeze period.

25. Before leaving this matter, we wish to make it clear that nothing in our decision should be construed as reflecting upon the good faith of the Board of Governors' decision. The Board of Governors was undoubtedly acting in a manner which it considered to be in the best interests of the university. Moreover, we express no views concerning whether the university has "just cause" to discharge the grievor. That is a matter for the determination of another tribunal to which the respondent remains entitled to resort. Finally, we express no view concerning the propriety of a revocation of tenure *outside the section 70 freeze period*. We merely find that, during the period of time to which section 70 applies, the employer is not entitled to revoke the grievor's tenure. Such action is a fundamental alteration of the rights of a tenured faculty member, and is inconsistent with the obligation to maintain the status quo contained in section 70.

26. For the foregoing reasons, the Board finds that the purported revocation and reconsideration of the grievor's tenure was a breach of *The Labour Relations Act*, and orders the respondent to cease and desist from those actions designed to call the grievor's tenure into question. The respondent is further ordered to forthwith reinstate the grievor to her former position and compensate her for any loss of benefits which she may have suffered. The Board will remain seized of the matter in the event there is any dispute concerning the issue of compensation.

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**2002-78-M** International Union of Operating Engineers, Local 793,  
(Applicant), v. Employer Bargaining Agency and  
**MacGregor Crane Service Limited**, (Respondents).

Arbitration – Bargaining Rights – Construction Industry – Practice and Procedure – Section 112a – Whether bargaining rights in certificate expanded by agreements – Whether bargaining rights restricted to areas where employees working – Whether grievance claiming Employer Bargaining Agency assessments carried by union proper

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members J. D. Bell and W. F. Ruth-  
erford.

**APPEARANCES:** *S. Wahl, M. Papery and P. Gauthier for the applicant; John D. Richard, Lynn Harnden, Murray MacGregor and Curtis Stevenson for the respondents.*

**DECISION OF THE BOARD;** August 7, 1979

1. This is a referral to the Board by the applicant of a grievance for final and binding arbitration pursuant to section 112a of the Act.

2. The applicant claims a violation of Articles 24.9 and 24.11 of the existing provincial agreement by which the parties are bound and which read as follows:

*“Article 24.9 Working Dues Check-Off*

Each Employer agrees to deduct from each employee in the bargaining unit, working dues at the rate of ten cents (10¢) per hour for each hour worked. Such deductions shall be forwarded along with the remittances required under 24.2 and 24.3 and supporting information shall be as required by the Trustees on the Reporting Forms. Such deductions shall be immediately paid to the local Union by the administrator of the plans.

*Article 24.11 Employer Labour Relations Fund*

- i) Each Employer bound by this agreement shall contribute five cents (5¢) per hour for each hour worked by each employee covered in this agreement as such Employer’s contributions to the administrative costs of the applicable Association.
- ii) The Employer shall remit such contribution with the other contributions under Article 24.2, 24.3 and 24.9 together with the supporting information as required by the Trustees on the Reporting Form.
- iii) Such contributions shall be immediately paid to the local or trade Association by the Administrator of the funds.
- iv) The E.B.A. agrees to hold harmless and indemnify the Union and

the Trustees against any liability incurred as a result of contributions made under 24.11 (i)."

3. The respondent's position is that it is bound by the collective agreement only to the extent that it has employees performing work in Board Area #29, and that to the extent that the agreement covers employees in Board Areas 13, 14, 15, 30 and 31 such agreement is not binding on the respondent. Further, that in respect to Article 24.11 dealing with contributions to the support of the Employer Bargaining Agency that the applicant has no status to enforce this provision of the collective agreement. It is noted that the Employer Bargaining Agency received notice of these proceedings and did not enter an appearance at the hearing.

4. The parties are agreed that the Board shall initially address itself to the issue of liability, if any, and to remain seized of the referral in the event that the parties were unable to agree on the quantum of entitlement, if any. The parties are also agreed that the issue is properly before the Board.

5. The applicant was certified on January 26, 1971 in respect to employees of the respondent working in Board Area #29, and the respondent states that the alleged violations, if any, are referable only to work performed in Board Areas 13, 14, 15, 30 and 31. The applicant's position is that the original bargaining rights granted in respect to Area 29 have been subsequently expanded to include employees working in the additional Areas as a result of a series of collective agreements.

6. Mr. J. R. McFarland, Director of Labour Relations of the Ottawa Construction Association since November 1, 1977 and previously from January 1, 1974 the Eastern Representative of the Construction Labour Relations Association of Ontario (working out of the offices of the Ottawa Construction Association) gave evidence. McFarland identified a document entitled "Application for Accreditation Collective Bargaining Authorization Power of Attorney" which sets out "The undersigned McGregor Crane Service Ltd. ... appoints the Ottawa Construction Association ... as its agent ... for collective bargaining with Local 793 of the International Union of Operating Engineers in respect of employees presently covered by a collective agreement for crane rental operations ... in Board areas 13, 14, 15, 29, 30, 31." This is signed by Mr. Murray McGregor and was executed May 21, 1971.

7. No evidence was introduced from which the Board can make a finding as to what employees of the respondent were, on May 21, 1971 covered by a collective agreement.

8. On July 27, 1972 a form entitled "The Labour Relations Act Employer Authorization" was executed on behalf of the respondent and setting out that the respondent "... authorizes the Ottawa Construction Association to represent the Employer as the bargaining agent for itself and all other employers covered by the Collective Agreement with International Union of Operating Engineers, Local 793 - Crane and Equipment Rentals Agreement in the following area and sector: ... areas 13, 14, 15, 29, 30, 31". The Association was authorized to make application for accreditation and that further "... the foregoing authorization to represent the Employer as Bargaining Agent and the authorization. ... To make an application for Accreditation ... may be assigned to the Ontario Construction Labour Relations Association. ..."



9. No evidence was led to identify “the collective agreement” referred to in the above authorization.

10. McFarland stated that the Ottawa Construction Association acted on behalf of MacGregor from 1972 onwards, relying on the above referred-to proxies, although MacGregor was not then and is not now a member of the Association. He explained that the Association only acts in respect to firms who have given a proxy, whether or not they are members of the Association.

11. A memorandum of settlement dated June 26, 1973 and signed by Murray MacGregor, amongst others was put in evidence, as was the collective agreement embodying the memo executed September 28, 1973 by the Ottawa Construction Association on behalf of named employers including MacGregor Crane Rental Services Ltd. Article 2.1 of that agreement reads as follows:

“The Employer recognizes the Union as the sole and exclusive bargaining agent for all of its employees coming within the jurisdiction of the International Union of Operating Engineers.”

12. There was also a Memorandum of Settlement relating to a collective agreement to run through April 30, 1977, signed by MacGregor. The memorandum is headed:

“Between:

E. Quipp & Co. Ltd., Ottawa Crane Rental Service, MacGregor  
Crane Serv. Ltd. and Hurdman Crane Rentals Ltd.

and

I.U.O.E., Local 793.”

McFarland states that he prepared the collective agreement based on this memorandum and which was executed September 8, 1975. This agreement was between “The Ottawa Construction Association on behalf of Crane Rental Contractors listed in Appendix A”, which appendix includes the respondent’s name, and I.U.O.E. Local 793. Article 2.1 of this agreement is identical to that cited in the 1973-75 agreement.

13. There was a further Memorandum of Settlement entered into April 27, 1977 extending the collective agreement to April 30, 1978 and was between a number of named Associations (collectively referred to as The Employer Bargaining Agency) including the “Ottawa Crane Rental Association”, and was signed on behalf of The Employer Bargaining Agency, and resulted in a further letter of understanding between “Ottawa Construction Association, on behalf of – (Crane Rental Contractors) and I.U.O.E. Local 793”, in which the employer agrees to be bound by the terms of settlement of April 27, 1977 and that such memorandum should be attached to and form part of the existing agreement and shall be in effect until April 30, 1978. Four signed copies of this letter were forwarded by the Ottawa Construction Association to Local 793 on June 27, 1977 and the covering letter states “This Association has on file proxies to negotiate on behalf of the following Employers ... MacGregor Crane Services Limited. ...”

14. Employer and Employee Bargaining Agency Designations were made on March 31, 1978 by the Minister of Labour, and provided that such agencies were authorized to represent in bargaining all employers and all employees "bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario."

A provincial agreement was executed on July 17, 1978 to run to April 30th, 1980 between the Employer Bargaining Agency and I.U.O.E. – Local 793, Employee Bargaining Agency. That collective agreement which is the agreement under which the instant grievance arises, contains the following clause:

"2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees for whom the Union has bargaining rights engaged in work covered by the schedules and classifications set out in this agreement. ..."

15. The threshold question to be addressed is the extent of bargaining rights held by the applicant in respect to employees of the respondent. It is clear that the provincial collective agreement presently in effect covers those "employees for whom the Union has bargaining rights"; thus, the extent of bargaining rights existing prior to this agreement must be determined.

16. The respondent relied heavily in argument on the 1971 Board certificate restricting bargaining rights to Board Area #29. In our view this misstates the effect of a Board certificate: such a certificate enables a trade union to legally compel an employer (who, by virtue of the certificate is legally obligated) to engage in collective bargaining. The parties may not bargain to an impasse in respect to the scope of coverage of such agreement if such scope varies from the terms of the certificate without running the risk of contravening the good faith bargaining obligation. However, as is made clear in the *Gilbarco Canada Ltd.* case [1971] OLRB Rep.Mar. 155 "The parties are free to amend, alter, extend or abridge the bargaining rights contained in the certificate". With the conclusion of the first collective agreement, the right to compel future bargaining flows out of that agreement. Again as is said in the *Gilbarco* case, *supra*, "in effect, the collective agreement supplants the rights given by the Board's certificate and the Board's certificate is spent once the collective agreement is signed".

17. It is clear to us that following the signing of a collective agreement, the certificate is irrelevant in determining the scope of bargaining rights, and definition of those can only be sought in the collective agreement between the parties.

18. The respondent also argues that at all relevant times the Ottawa Construction

Association had been authorized as the respondent's agent in collective bargaining only to the extent that the respondent had employees covered by a collective agreement. Central to this argument is the assumption that at the time of execution of the authorization to the Association, the respondent had a collective agreement covering employees only in Area #29. As earlier adverted to, no collective agreements were filed with the Board in respect to these time periods and it is clear from McFarland's evidence that the Association purported to act on behalf of MacGregor in respect to all relevant Board Areas and that he relied on the executed proxies for so doing. However, assuming for the sake of argument that the factual situation then supported the respondent's thesis, it would still remain for this Board to determine whether the subsequent actions of the parties had resulted in a broadening of both the authorization and of the scope of coverage of the collective agreement to the extent that at the time of Employer and Employee Bargaining Agency Designations made by the Minister, bargaining rights were held by the applicant in respect to all Board Areas now claimed.

19. The collective agreements of 1973-75 and 1975-77 are not collective agreements between an employer's organization and a trade union such as would give some relevancy to Section 43(1) of *The Labour Relations Act*. They are clearly individual collective agreements, commonly negotiated, between individual employers and the same union. The Memorandum of Settlement in both instances was signed by Murray MacGregor and referred to a prior collective agreement with amendments to specific clauses none of which touched on the scope of coverage. In both instances, this was the basis of preparation of the collective agreement executed by the Association on behalf of named companies, including the respondent. Both contracts included an identical scope of coverage clause as "Article 2.1 The employer recognizes the Union as the sole and exclusive bargaining agent for all of its employees coming within the jurisdiction of the International Union of Operating Engineers". In our view the signed Memoranda of Settlement preclude the respondent making any argument that it had been bound by an agent acting without authorization.

20. The Board refused the respondent's request to call extrinsic evidence to aid in the interpretation of Article 2.1. That Article, to our mind, is unambiguous and unequivocal in defining "all employees" without any geographical definition. Under such circumstances, it would be improper for the Board to consider extrinsic evidence. See the *Andco Anderson Limited* case Board File 2183-76-M where the Board makes a comprehensive summary of the jurisprudence relating to the receiving of such evidence.

21. This Board finds that the collective agreements of 1973-75 and 1975-77 established bargaining rights in the applicant in respect to all Board Areas here relevant. On April 27, 1977 a Memorandum of Settlement was executed between 7 employer associations (including the Ottawa Crane Rental Association) described as the Employer Bargaining Agency. The Memorandum was signed, *inter alia*, by a representative of the Ottawa Crane Rental Association, and contained an extension of the collective agreement to April 30, 1978 and a provision that "The language of all affected collective agreements shall remain unchanged except as outlined herein". No change is incorporated respecting Article 2.1 of the respondent's collective agreement. A further undated letter of understanding executed by the Ottawa Construction Association, on behalf of named employers, agreed to be bound by such settlement and that the Memorandum of Settlement "shall be attached to and form part of the existing collective agreement".



22. The Board finds that at the time of the Bargaining Agency Designations that the applicant had bargaining rights in respect to all employees of the respondent in the relevant geographic areas, and that the respondent's failure to make deductions and remittances to the Trustees, for work performed by its employees in Board Areas 13, 14, 15, 30 and 31 is a violation of Article 24.9 of its present collective agreement.

23. The respondent has raised the status of the applicant to carry a grievance under Article 24.11 which calls for contributions by the Employer to the Employer Bargaining Agency, in the absence of any complaint by that Agency. The case of *J. G. Rivard* [1976] OLRB Rep. Sept. 540 to which we are referred by the applicant did not deal with this question directly. In that case a reference had been made under Section 112a of the Act in which an employer organization sought to enforce terms similar to Article 24.11 here against the employer. The Board there found:

"The present dispute, notwithstanding the fact that it arises out of the wording of a collective agreement, is clearly a matter arising between two entities of like interest and constitutes an internal dispute between them, and not a dispute between either party to the collective agreement . . . ."

The facts of the instant case are that we have one party to a collective agreement seeking to have the other party to that agreement abide by a term of that agreement to the benefit of a third party. It is argued by the respondent that the amendments to the Act providing for provincial bargaining now provide access to arbitration by both the Bargaining Agency and by the employer and for that reason, a grievance such as the instant one should be carried by the Employer Bargaining Agent. In this connection we note Article 6.7(b) of the collective agreement provides:

"The E.B.A. or an Employer may process a written grievance alleging a violation of or the interpretation of this agreement at Step Two of the above procedure."

Even if we were to accept the respondent's view of the effect of amendments relating to provincial bargaining, which we do not, the question would remain as to the standing of the applicant to also carry such a matter to arbitration.

24. The thrust of *The Labour Relations Act* in requiring binding arbitration in settlement of the interpretation, application or administration of the collective agreement is to ensure that no dispute between them shall go unresolved and thus militate against harmonious relations. Where the parties have identified an area of interest and have exchanged mutual covenants in a collective agreement to crystallize an undertaking, it is not for a Board of Arbitration to determine that nonetheless such covenants can be of no benefit to one or the other of the parties. Apart entirely from the applicant's perception of its interest or benefit in enforcing a contractual undertaking, both parties to an agreement have a right to ensure that all undertakings arising out of contractual commitments are performed. This Board therefore finds that the applicant has status to carry on arbitration in respect to the application, interpretation of Article 24.11 of the collective agreement and the Board further finds that the respondent has violated that Article by failure to remit to the Trustees contributions required in respect to work performed by the respondent employees in the relevant Board Areas.

25. We turn now to the question of the date from which liability should fasten on the respondent in respect to violation of Articles 24.9 and 24.11. The applicant filed with the Board a copy of a standardized reporting form in respect to remittances and which is required to be completed by affected employers on a monthly basis. This form filed is referable to the month of November, 1978 setting out the total hours for which some nine employees of the respondent were paid, and based on that total, contributions were calculated and remitted by the respondent for Welfare and Pension funds. (The Board notes in passing that such contributions were in respect of work performed other than in Board Area #29.) That portion of the form provided for calculation of Working Dues Check-off and of Labour Relations Fund is marked "not applicable". The applicant called oral evidence to establish failure by the respondent to make the required contributions from July 1st, 1978 but the Board finds that evidence to fall short of establishing those facts. Such evidence did establish that no remittances were received for the month of November 1978 or subsequent months. We are of the opinion that the applicant is entitled to relief from the month of November 1978 onwards, and that the exercise of normal and reasonable diligence would have revealed to the applicant the respondent's failure at an earlier date and the applicant is not now entitled to raise the matter. In this regard we note a provision in the collective agreement in Article 6.8 which provides, "a grievance concerning Welfare or Pension contributions may be presented within 30 days after the particulars of such grievance should have reasonably become first known to a Union representative". The items under Article 24.9 and 24.11 are not, of course, either Welfare or Pension contributions, but in the absence of the parties having specifically dealt with the matter, we are of the opinion we should impose the same standard as in respect to Welfare and Pension grievances. We also note that the applicant first became aware of the default in respect to November 1978 on December 18th and filed its grievance on January 8, 1979.

26. The Board therefore orders the respondent to calculate the hours worked by its employees in Board Areas 13, 14, 15, 30 and 31 for all months starting with November 1978 to the date of this Order and to make remittances as required under Articles 24.9 and 24.11 of the collective agreement to the Trustees. In the event that the parties fail to agree as to the amounts of money so involved, the Board will remain seized of the matter.

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**0665-78-M Nortex Products Company** (Formerly Division of Superpact Corporation Limited), (Employer), v. The United Steelworkers of America, for itself and on behalf of Local Union 6269, (Trade Union).

Collective Agreement – Reference – Timeliness – Collective agreement providing that it would automatically continue if notice not given – Notice given in accordance with Act but not agreement – Agreement provisions take precedence – *Bradburn v. Wentworth Arms* considered.

**BEFORE:**G. Gail Brent, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

**DECISION OF VICE-CHAIRMAN G. GAIL BRENT AND BOARD MEMBER J. D. BELL;** August 16, 1979.

1. This application for reconsideration by counsel for the applicant has been made in light of the judgment of the Supreme Court of Canada in *William Bradburn et al. v. Wentworth Arms Hotel Limited et al.* pronounced in December 21, 1978, (79 CLLC ¶14,189).
2. Upon a careful study of that decision, it is not apparent that the Board's reasoning in *Hield* is affected or undermined. The *Hield* line of cases deal with the interpretation of section 45 of the Act which is not dealt with by the Supreme Court of Canada.
3. It would appear that the *Wentworth Arms Hotel* case, *supra* can be confined to the question facing the Court then, that is, whether the parties to the collective agreement in that case could agree to circumvent the scheme of the Act even when Notice to Bargain was timely.
4. While it is possible that the Board in the future may decide to depart from the *Hield* reasoning, the decision of the Supreme Court of Canada in the *Wentworth Arms* case does not compel it to do so.
5. This request for reconsideration is hereby denied.

#### **DECISION OF BOARD MEMBER O. HODGES:**

1. I dissent. I would have allowed the request for reconsideration. The original application in this case was made pursuant to section 96 of the Act and was denied on the basis of this Board's interpretation of section 45 of the Act, (Decision dated Nov. 29, 1978, [1978] OLRB Rep. Nov. 1036) adhering to the reasoning first set down in *Textile Workers Union of America, C.I.O. – C.L.C. and Hield Brothers Limited of Kingston*, (1957), 57 CLLC 1638, ¶18,071 and followed in subsequent Board decisions. (see *Lakehead Hotel Keepers' Association*, [1966] OLRB Rep. May 116, *Kingston Builders' Exchange*, [1959] OLRB Rep. May 82, *Dundas Construction Company Ltd*, [1962] OLRB Rep. Nov. p. 319, and *Kimberly Clark*, [1963] OLRB Rep. Jan. 449) Although I concurred with the majority originally, I expressed my serious doubts as to the correctness of the *Hield* decision at that time.
2. The subsequent decision by the Supreme Court of Canada in *Bradburn et al v. Wentworth Arms Hotel Ltd. et al.*, (1978) 79 CLLC ¶14,189 was relied upon by the applicant in these proceedings. In denying the request for reconsideration the majority correctly point out that the Supreme Court in *Bradburn* dealt with section 44(2) of the Act but in my view the expression of the general philosophy underlying the Act is applicable to section 45 as well. Mr. Justice Estey in delivering the opinion of the majority in that case observed at page 15,139:

“The scheme of labour relations under the Ontario Act is founded upon collective bargaining leading to a collective agreement and thereafter to replacement agreements. Collective bargaining in turn is an activity in which the parties participate in the full realization of their respective economic positions and strengths subject only to the limitations and boundaries imposed on the parties by *The Labour Relations Act*. Consequently, collective agreements, which are of course creatures of statute finding both their origin and their extent within the Act reflect these realities. A Court therefore should not be quick to



place a meaning on a term of a collective agreement which would put that clause in conflict with the general philosophy of labour relations as established under the applicable statute. Such should be the case only where the contract by its clearest intent and provisions dictates otherwise. I do not find such to be the case here.”

3. The approach which should be taken in dealing with labour problems was also stated by Mr. Justice Estey at page 15,140:

“The disposition of this proceeding calls into play all the interpretive tools available to a court in construing both a contract and a statute. The conclusions reached by the various majorities below depend of course upon the approach taken in the interpretation of the contract and the statute and their relationship. The minority of the Arbitration Board, T. E. Armstrong, for example, concluded:

‘I do not believe that it was the intention of the Legislature to permit a collective agreement to be fashioned which would perpetually foreclose the rights to strike and lockout. Accordingly, I believe that any tenable interpretation of the contract language which will preserve the statutory right to strike in the post-conciliation period, is to be preferred to an interpretation which will negate the right.’

Lacourciere, J.A., in dissenting in the court below, stated:

‘In assessing the significance of this Article 13.02, one must not only follow ordinary canons of construction, but do so in the framework of *The Labour Relations Act* as a whole as well as modern labour law and practice. The conflicting interests must be weighed realistically and fairly, having regard to the social policy behind *The Labour Relations Act* as progressively administered by the Labour Relations Board and interpreted by the courts. It is a prevailing assumption in the area of labour conflicts that a union can legally strike, and that a company can resort to lock-out when conciliation procedures have been exhausted and statutory restraints followed. It is in that context that the article relied upon by the employers must be interpreted. In that respect, I prefer the view stated by T. E. Armstrong, Q.C., in his dissent from the majority award.’ ”

4. The crux of the *Hield* decision lies in the acceptance of the principle that a properly drafted collective agreement can (under section 45(2)) provide for a more restrictive notice period for renegotiation of the collective agreement than is provided for statutorily in section 45(1).

5. Section 45 provides:

“(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal,

with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with the provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1."

According to the *Hield* reasoning, if the collective agreement provides that it will "continue to operate" and neither party gives notice according to its terms, then the agreement itself never "ceases to operate", so that section 45(1) never becomes operative. On the other hand if the agreement provides that it will be "automatically renewed", the failure to comply with the notice requirement of the agreement does not prevent the agreement from terminating, and hence timely notice from being given under section 45(1).

6. This semantic difference allowed *Hield* to be distinguished in subsequent decisions. As Chairman Finkelman observed in *Walfoods Limited*, 58 CLLC 1721, "the term 'renew' suggests not a continuance of the existing agreement but a resuscitation or rejuvenation or revivication". In this regard see also *C. H. Heist (Canada) Limited*, [1973] OLRB Rep. Apr. 218, *London Generator Service*, [1978] OLRB Rep. Oct. 923 and *Selinger Wood Limited*, Board File No. 0234-79-U, as yet unreported.

7. The language in the Termination Clause of the agreement in this case, "remain in full force", is similar to that used in *Cem-Al Spray Limited*, [1974] OLRB Rep. Oct. 688, in which the Board also distinguished *Hield*. After reviewing the cases, Chairman Egan observed, in *London Generator Service*, *supra*, at page 937, "It would thus seem that the word 'renew' and the phrase 'remain in force' were viewed as having the same effect in bringing an agreement to an end." It is not so clear then that the clause in question in this case comes within the *Hield*-type provision, assuming one accepts the distinction in *Hield* as valid.

8. In my view however, the time has come for the Board to refuse to follow the *Hield Brothers* case. The dissenting opinions of Board members Archer and Harvey in *Hield* reflect the correct interpretation of the section:

"It is noteworthy that the subsection does not say that where there is a collective agreement, the notice must be given in the terms of the collective agreement and not in accordance with subsection (1) of section 38 [now s. 45] nor does it say that a notice given in accordance with section 38(1) is invalid if there is a collective agreement which contains provisions for giving of the notice which differ from those in section 38(1). It simply says that if a notice is given in accordance with the provisions in a collective agreement, then it shall be deemed to comply with subsection (1).

The simple meaning of this subsection is that, if a collective agreement contains provisions for the giving of notice which are different from those contained in section 38(1) and notice is given in accordance with such provisions in the collective agreement, then the notice is valid even though the time and manner in which it was given are different from those provided in section 38(1). In no way which is justified can

this subsection be read to mean that if notice is given in accordance with section 38(1) and not in accordance with the provisions of the collective agreement, then such notice is invalid. To give it this meaning is to stretch and indeed distort, the language of section 38(2).

Counsel before the Board have often drawn the Board's attention to section 10 of *The Interpretation Act*. That section provides that "every act shall be deemed remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the act according to the true intent, meaning and spirit thereof". In our opinion, the interpretation given by the majority to section 38(2) is a technical one which narrows the intent and meaning of the section and harms the attainment of the objects of *The Labour Relations Act*.

It seems to us that the application of section 10 of *The Interpretation Act* to both subsection (1) and subsection (2) of section 38 means that: (a) subsection (1) sets forth certain statutory provisions within which a notice must fall and (b) subsection (2) enlarges these provisions to include also provisions in a collective agreement, even where they are different from those in subsection (1). On this basis, a notice is always valid if it meets the requirements of subsection (1) and, where there is a provision in a collective agreement, it may also be valid if it does not meet the requirements of subsection (1) but does meet the requirements of the agreement.

It seems to us therefore that even within the confines of legal interpretation, the notice given in this case was valid under the Act, and accordingly we would have granted conciliation."

9. Not only does the *Hield* decision effectively allow the parties to contract out of the notice provisions given by section 45(1), "contracting out" being contrary to the spirit of the Act and the principles enunciated in *Bradburn*, but it also has created difficulties in interpreting other sections of the Act, particularly those relating to rival unions and dissenting employees who wish to challenge the incumbent union. Both section 5 and section 49 give rights which depend for their invocation on determining in advance a terminal date for the operation of the agreement. This problem was dealt with by the Board in two cases, neither of which referred to *Hield*. The first was *Cobalt Foundry Limited*, 58 CLLC ¶18,119 where the Board remarked: "the purpose of section 37 (now section 44) of the Act is not only to establish what has commonly been described as a 'minimum year of peace' but also to establish a clear terminal date which will facilitate the exercise by a rival union and by the employees in the appropriate bargaining unit of the rights made available to them." The second was *Norfolk Knitters Limited*, [1973] OLRB Rep. April 202 where the Board allowed a challenge by a rival union in the last two months of the collective agreement even though it had not "ceased to operate" but had "continued automatically" for another term. The Board maintained, and rightly so, that "the commencement of the last two months of the operation of any collective agreement must be clearly determined at the time the collective agreement is signed". Section 5(6) attempts to solve this problem but on its face would still allow a postponement of the open period for one year.



10. The principles stated in *Cobalt* and *Norfolk* are in conflict with the reasoning in *Hield*. If employees are bound by a collective agreement of the *Hield*-type they will have no way of knowing from the face of the document whether the open period will occur in the two months immediately preceding the nominal expiry date, or a year later. If one accepts the propositions that employees should be entitled to advance notice of the open period so that they can plan their affairs accordingly then the *Hield* reasoning must be rejected.

11. Where the legislature has intended the parties to be able to contract out of any rights given by the statute it does so explicitly (see section 37(5a)). Section 45(2) cannot be viewed as an explicit approval of "contracting out".

12. The collective agreement takes its life from the statute and must be viewed as subordinate to statute where conflict occurs. This is the view expressed by the Board in the *Selinger Wood Ltd.* case, *supra*, where it remarked: "In a situation where the notice requirement in the collective agreement is more restrictive than that contained in the Act and the notice given satisfied the requirements of the Act but not the agreement, the provisions of the Act take precedence."

13. The word "deemed" in section 45(2) implies a situation which otherwise would not be the case and hence is directed at notice provisions in agreements which are more generous than the statute and would not otherwise be good notice under section 45(1).

14. In my opinion the wording of the statute does not dictate a denial of the basic rights of employees. Notice anytime within 90 days prior to the termination date, a date which must be ascertained at the commencement of the agreement and not dependent on the giving of notice, should terminate the agreement and thus permit the employees the benefit of bargaining for a new collective agreement.

15. In the present case, I would have allowed the request for reconsideration, and, following my reasons as stated herein, I would have accepted the notice to bargain given by the union as proper under the Act and accordingly I would have advised the Minister that a Conciliation Officer could be appointed.

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**0073-79-M** The Labour Bureau of The Ontario Road Builders Association and of The Ontario Sewer and Watermain Contractors Association, (Employer), v. **International Union of Operating Engineers, Local 793**, (Trade Union).

**Bargaining Rights – Conciliation – Reference – Successor Status – Council of trade unions party to agreement – Member of council withdrawing and seeking conciliation after expiry of agreement – Whether council or member holding bargaining rights – Whether member requiring successor status declaration – Effect of withdrawing from council.**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

**APPEARANCES:** *G. Grossman for the employer; L. C. Arnold and Ernie Ford for the trade union.*

**DECISION OF THE BOARD;** August 29, 1979

1. The Minister has referred to the Board, pursuant to section 96 of the Act, the question as to whether the Minister has authority under *The Labour Relations Act* to appoint a conciliation officer.

2. The trade union has requested the appointment of a conciliation officer. The employer has opposed the trade union's request for the appointment of a conciliation officer.

3. The trade union made its request for the appointment of a conciliation officer on February 23, 1979, with respect to certain employers on whose behalf The Labour Bureau of The Ontario Road Builders Association and of The Ontario Sewer and Watermain Contractors Association (the "Association") entered into a collective agreement. The collective agreement was made on June 3, 1975, and remained in effect until December 31, 1977. This collective agreement was also executed by a T.E.L. Council of Trade Unions (the "T.E.L.") "acting as the representative and agent of those unions listed in Schedule 'B' to this Agreement". Schedule 'B' lists (i) Local 793, International Union of Operating Engineers, (ii) Locals 247, 491, 493, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089 of the Labourer's International Union of North America and (iii) Locals 91, 141, 230, 879, 880 and 990 of the Teamsters' International Union.

4. Notice to bargain to make a new collective agreement was given by the T.E.L. on October 6, 1977, and meetings were held with representatives of the Association in an effort to make a collective agreement on October 21, November 25, December 19, 1977 and January 18, April 26, May 3, 18 and 23, and June 12, 1978.

5. The Association and the T.E.L. have not concluded a collective agreement and the trade union desires the appointment of a conciliation officer with reference to situations where it claims to have bargaining rights. The trade union takes the position that it possesses certain bargaining rights rather than the T.E.L. The Association takes the position that the trade union does not hold the bargaining rights in question and that such bargaining rights are held by the T.E.L.

6. The Board heard evidence from Ernest Ford, the labour relations manager of the trade union, and, on the agreement of the parties, received certain documentary evidence.

7. The evidence established that prior to 1970 the trade union joined T.E.L. together with various locals of the Labourers' International Union of North America and the Teamsters' International Union. The affairs of the T.E.L. and the relationships between the T.E.L. and the trade unions who composed it were governed by a constitution and by-laws.

8. On June 3, 1975, a collective agreement was made and entered into. The preamble and article I of this collective agreement provides:

"Copy of Collective Agreement made on the 3rd of June, A.D. 1975 incorporating amendments made by Supplementary Agreement dated the 16th day of September, A.D. 1975.

BETWEEN:

THE LABOUR BUREAU OF THE ONTARIO ROAD BUILDERS ASSOCIATION AND OF THE ONTARIO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION, on behalf of those Contractors listed in Schedule 'A' for the zone indicated for each of the Contractors respectively

hereinafter called 'the Bureau'

OF THE FIRST PART

T.E.L. COUNCIL OF TRADE UNIONS acting as the representative and agent of those Unions listed in Schedule 'B' to this Agreement

hereinafter called 'the Council'

OF THE SECOND PART

WHEREAS the Bureau, acting on behalf of its members Contractors, and the Council, acting on behalf of its member unions, wish to make a collective agreement with respect to certain employees of the members of the Bureau and to provide for and ensure uniform interpretation and application in the administration of the collective agreement;

AND WHEREAS in order to ensure uniform interpretation and application the Unions listed in Schedule 'B' to this agreement wish to negotiate and administer the said agreement through the Council, and for that purpose have constituted the Council and empowered it to act as agent for each Union listed in Schedule 'B';

AND WHEREAS the Bureau recognizes the formation by the Unions of the Council and agrees to deal with the Council as the agent of the Unions in negotiating and administering a common collective agreement;



AND WHEREAS the said Unions and the Council recognize the Bureau as the representative of its members and agree to deal with the said Bureau as the agent of the contractors who are members thereof in negotiating and administering a common collective agreement and agree not to negotiate with any of the said Contractors on an individual basis;

AND WHEREAS negotiations have taken place between representatives of the Bureau and of the Council for the purpose of arriving at a standard and uniform Collective Agreement between the Contractors listed in Schedule 'A' and the local Unions represented by the Council listed in Schedule 'B' of this agreement;

AND WHEREAS the Unions listed in Schedule 'B' have authorized the Council to enter into this agreement as evidenced by their signatures to this agreement.

NOW THEREFORE IT IS AGREED AS FOLLOWS:

*ARTICLE I – T.E.L. COUNCIL OF TRADE UNIONS*

1.01 The members of the T.E.L. Council of Unions are those Unions listed in Schedule B to this agreement.

1.02 The Unions named in Schedule B to this agreement each agrees with all the others, with the Council and with the Bureau:

- (a) to maintain the T.E.L. Council of Unions composed of the representatives of those Unions named in Schedule B who are parties to this agreement, and no others, as their representative and agent for the purpose of bargaining collectively with the Bureau and administering this agreement; and
- (b) to delegate, and they do hereby delegate, to the Council acting as their representative and agent, all their rights as bargaining agent for members of their respective Unions who come within the scope of this agreement and agree to not withdraw such delegation of rights nor to seek to bargain individually with the Bureau or its members; and
- (c) to be governed by the terms of this agreement and by all lawful settlements of disputes and grievances made on their behalf by the Council pursuant to this agreement.

1.03 The Council, acting as the representative and agent of the Unions listed in Schedule B accepts the delegation of rights as set out in Section 1.02 hereof and assumes the responsibility of bargaining collectively with the Bureau on behalf of all employees of the Contractor members of the Bureau who come within the scope of this agreement."

9. This collective agreement which remained in effect until December 31, 1977, was effective throughout Ontario and covered employers for various zones to the extent of the bargaining rights which were held with respect to each employer.

10. The Association argued that in order for the request to succeed the trade union would have to make an application under section 54 of *The Labour Relations Act* for a transfer of jurisdiction. The Association also argued that the constitution and by-laws of the T.E.L. makes no reference either to the transfer of jurisdiction or to the withdrawal of bargaining rights. The Association stressed article 1.02(b) of the collective agreement and argued that the article contained the best statement of how the bargaining rights were to be handled, namely, with the agreement not to withdraw the delegation of bargaining rights and not to seek to bargain individually with the Association or its members. The Association reasoned that the most reasonable conclusion is that if a trade union withdraws it leaves its bargaining rights behind.

11. The evidence before the Board established that the trade union in some instances initially acquired bargaining rights either through certification or voluntary recognition. However, in other instances the trade union's bargaining rights were either extended geographically for additional zones within Ontario or originated as a result of voluntary recognition afforded to the T.E.L. The Association also relied on the fact that in Board File No. 16359-69-R (unreported decision of the Board dated July 28, 1969) in the *Falgar Enterprises and Rentals Limited* case; the Board had determined that "T.E.L. Council of Unions" had been vested with appropriate authority by its constituent unions to enable it to discharge the responsibilities of a bargaining agent, pursuant to section 8a(1) [now section 9(1)] of *The Labour Relations Act*, and that the Board had issued a certificate to "T.E.L. Council of Unions". The Association argued that once "T.E.L. Council of Unions" had acquired status before the Board as a certified council of trade unions it retained this status. The Association also argued that there was no evidence that the trade union had complied with the requirements of the constitution with respect to withdrawal.

12. The Association's argument with respect to the applicability of section 54 depends upon the existence of bargaining rights by the T.E.L. in the context of this reference. The Board is not persuaded on the evidence before it that the T.E.L. possesses any bargaining rights on its own behalf separate and apart from the trade unions which compose the T.E.L. In the *Falgar Enterprises and Rentals Limited* case, *supra*, the T.E.L. was held to be a council of trade unions and was certified and acquired bargaining rights with respect to a bargaining unit of certain employees of Falgar Enterprises and Rentals Limited in the capacity of a certified council of trade unions. Falgar Enterprises and Rentals Limited is not affected by this reference. There was no evidence before the Board that the T.E.L. ever again received a certificate from the Board in the capacity of a certified council of trade unions. The Board notes that the T.E.L. was composed of different trade unions at the time of the issuance of the certificate with respect to Falgar Enterprises and Rentals Limited compared to its composition prior to the withdrawal of the trade union.

13. The constitution under which the T.E.L. operates authorizes it in article IV, section 3, to make applications for certification under *The Labour Relations Act*. While article IV, section 4 authorizes the T.E.L. to negotiate, bargain for and enter into collective agreements, section 6 of this article authorizes the T.E.L. to act as the duly authorized representatives and agents of the constituent trade unions in conjunction with the delegated represent-

ation of the trade unions involved for the objects and purposes set out in the constitution. By virtue of article XIV, section 3, the constituent trade unions retain control over the processing of their own grievances to arbitration. There is nothing in the constitution, in our view, which vests appropriate authority in the T.E.L. to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 9(1) of *The Labour Relations Act*. The Board finds that the constitution constitutes the T.E.L. to act as a representative and agent only for the trade unions which compose the T.E.L.

14. The collective agreement which was made on June 3, 1975, provides in its preamble that the T.E.L., acting on behalf of its member unions, wishes to make a collective agreement and also provides that the unions wish to negotiate and administer the collective agreement through the T.E.L. and for that purpose have constituted the T.E.L. and empowered it to act as agent for each union. Similarly, the Association agrees to deal with the T.E.L. as the agent of the unions in negotiating and administering a common collective agreement. The preamble also states that the unions have authorized the T.E.L. to enter into the collective agreement as evidenced by their signatures to the collective agreement. Article 1.02(b) of this collective agreement states that the unions agree to delegate to the T.E.L. acting as their representative and agent all their rights as a bargaining agent and agree not to withdraw such delegation of right nor to seek to bargain individually with the Association or its members.

15. The trade unions which compose the T.E.L. have delegated their bargaining rights to the T.E.L. and have empowered it to act as their agent. In our opinion, the collective agreement provides for the delegation of the bargaining rights of the trade unions which compose the T.E.L. to the T.E.L. during the existence of the collective agreement and does not provide for the vesting of any bargaining rights in the T.E.L. It was the uncontradicted testimony of Mr. Ford that some of the bargaining rights claimed by the trade union were obtained by the T.E.L. on behalf of the various unions which compose the T.E.L. This reinforces the concept that the T.E.L. was acting as a representative and agent of the trade unions which compose the T.E.L. rather than acquiring and exercising bargaining rights on its own behalf.

16. The Board finds that the T.E.L. was acting as a council of trade unions and not as a certified council of trade unions. The evidence establishes that during November of 1978 the trade union, before a collective agreement was entered into, notified in writing the Association and the employers that it represents, pursuant to section 43(5) of the Act, that it would not be bound by a collective agreement between the T.E.L. and the Association or the employers it represents.

17. In the alternative, even if the Association had been able to establish that the T.E.L. is, in the context of this reference, a certified council of trade unions, the trade union, pursuant to section 47(2), notified the T.E.L., the trade unions which compose it, the Association and the employers it represents of its action in withdrawing from the T.E.L. in November of 1978. Such action had effect, pursuant to section 47(2), ninety days from that time, that is to say, prior to the date of the filing of the request for the appointment of a conciliation officer. The Association raised objections regarding the sufficiency of the evidence with respect to the trade union's withdrawal from the T.E.L. While the testimony was not complete on some points, the Board is satisfied that since there was no indication to the contrary the trade union complied with the known requirements for the withdrawal from



the T.E.L. and that such withdrawal was apparently accepted by the representatives of the T.E.L.

18. In our opinion, the Minister has the authority under *The Labour Relations Act* to appoint a conciliation officer.

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**0693-79-R** International Union of Electrical, Radio and Machine Workers, (Applicant), v. **Quality Circuits Manufacturing Limited**, (Respondent), v. Group of Employees, (Objectors).

**Certification – Petition – Circulation by lead hands on company premises – Whether expressing voluntary opposition.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman, and Board Members W. G. Donnelly and M. J. Fenwick.

**APPEARANCES:** *Chris G. Paliare and Lloyd Saunders for the applicant; William S. Challis and John Graydon for the respondent; Oresti Bodjakos and Paylos Karatsoreos for the objectors.*

**DECISION OF THE BOARD;** August 29, 1979

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2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Metropolitan Toronto, save and except plant managers, persons above the rank of plant manager, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. A statement of desire in opposition to the application was filed with the Board in this matter. The statement bears a sufficient number of signatures of persons who also signed union membership documents that if it is proven to be a voluntary expression of those who signed the Board will direct the taking of a representation vote pursuant to its authority under section 7(2) of the Act. Mr. Oresti Bodjakos and Mr. Paylos Karatsoreos appeared before the Board to give first hand evidence concerning the origination, preparation and circulation of the statement. Their evidence discloses two facts which when considered together must cause the Board to find that the statement does not represent the true wishes of those who signed. The evidence discloses firstly that Mr. Bodjakos is a lead hand. Mr. Bodjakos was involved in both the preparation and circulation of the statement. He personally witnessed 9 of the 20 signatures which appear on the document including those of drilling department employees over whom he acts as lead hand. There are four lead hands in the

work place, one of whom is Mr. Bodjakos, all of whom report to the plant manager. There are no foreman and hence the plant manager is the first level of managerial exclusion. The evidence discloses secondly that although the signatures were affixed to the statement during breaks or at lunch time on July 19 and 20, all of the persons who signed did so on company premises.

6. The Board has long recognized the responsive nature of the employer/employee relationship (See *Pigott Motors (1961) Ltd.* 63 CLLC ¶16,764). Indeed the Ontario Div. Court in the recent *Tandy Electronics Limited* case, released on August 8, 1979 (as yet unreported) commented at page 12 that "It is easy to appreciate the sensitivity of employees to the disclosure to their employers of their interest in union membership." Accordingly the Board has held that a statement circulated in circumstances as would cause a reasonable employee to conclude that management may be involved and may become aware of who signed and who did not sign does not represent a voluntary statement (See *Morgan Adhesives Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein).

7. In the context of a work place where the lead hands report directly to the plant manager, the Board is not prepared to find that a statement circulated by a lead hand on company premises constitutes a voluntary statement of those who signed. On an objective assessment the circulation by a lead hand on company premises would cause a reasonable employee to conclude that management may be involved and may become aware of who might sign and who might not. The Board hereby finds that the statement does not represent the voluntary expression of those who signed.

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9. A certificate will issue to the applicant.

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**1795-78-U** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant), v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of **St. Mary's Hospital**, London, Ontario, (Respondent).

Change in Working Conditions – Full and partimers receiving same salary increases in past – Whether pattern of granting same increases privilege frozen by section 70.

(Decision omitted from [1979] OLRB Rep. March)

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and M. J. Fenwick.

**APPEARANCES:** *Ted Wohl and Al Campbell for the applicant; D. J. McNamara and Mrs. Helen Brown for the respondent*

**DECISION OF THE BOARD;** March 30, 1979

1. This is a complaint under Section 79 of *The Labour Relations Act*, alleging a violation of the "statutory freeze" imposed by Section 70 of the Act. The alleged violation involves the failure of the respondent to grant to its part-time employees the wage increase which it has already granted to its full-time employees. The complainant alleges that this failure is at variance with the respondent's long established practice and is an alteration of a "privilege" contrary to Section 70(2) of the Act. That section provides as follows:

"Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, *the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,*

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
  - (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union."
- [Emphasis added]

2. There are certain facts which are not in dispute. On or about October 25th, 1978, the applicant trade union applied for certification as the bargaining agent for the part-time and full-time employees of the respondent. By letter dated October 27th, 1978, the Registrar of The Labour Relations Board notified the respondent of these applications. On December 15th, 1978, the Board conducted representation votes to ascertain the wishes of the employees with respect to trade union representation. The majority of part-time employees indicated that they wished to be represented by the applicant; the majority of full-time employees indicated that they did not wish to be represented by the applicant. As of the date of this hearing, no certificate has been issued to the applicant in respect of the part-time employees and, accordingly, the applicant has not issued a notice to bargain pursuant to Section 13 of *The Labour Relations Act*. There is no dispute that the parties are currently within the time frame to which Section 70(2) applies.

3. On October 27th, 1978, (i.e., after the trade union's organization campaign and application for certification, but before formal notice of that application had been received by the respondent) the respondent posted a notice directed to all its employees which provided as follows:

"We wish to advise you that Administration is studying the salary adjustments which are due to you from April 1, 1978.

Due to the confusion as to the amount of these increases which have to be approved by the government Anti Inflation Board, Parkwood Hospital, Victoria Hospital, and University Hospital have also not made any adjustments on this year's increases.

Our Administration Committee hope that in the near future they will be able to pay your salary adjustments retro to April 1, 1978.

We will keep in touch with you re: this matter."



This notice does not expressly promise a wage increase of any particular amount, but the only reasonable inference to be drawn from its posting and its terms is that a salary adjustment would be forthcoming in the near future and that, subject to any restrictions imposed by the Federal Anti-Inflation Board, the employer intended to make such salary adjustment retroactive to April 1st, 1978. This notice was directed to both full-time and part-time employees.

4. On January 5th, 1979, the trade union's application with respect to the full-time employees was dismissed. On or about January 12th, 1979, these full-time employees received a wage increase of 15 cents per hour. The part-time employees, whose application was still pending before the Board, received no increase at that time, or subsequently. On or about January 26th, 1979, the full-time employees received a retroactive payment, based upon a 15 cent per hour increase, "back dated" to April 1st, 1978. The part-time employees have received no similar payment. There is no dispute, therefore, that the employer has treated those employees who have rejected trade union representation in a different manner from those who have indicated their support for the union; however, this is not sufficient, in itself, to establish a breach of Section 70(2).

5. The Hospital has three general categories of employee: "full-time", "part-time" and "relief" or "call in". The terms "full-time" and "part-time" are self-explanatory. The "relief" or "call in" employees do not work according to a pre-established schedule but are "called in" to work as and when required. When called in they work side by side with the regularly scheduled full-time and part-time employees and perform similar duties.

6. The trade union called four witnesses to give evidence concerning the pattern of wage increases which they have received in the last few years. This evidence was somewhat fragmentary since, as might be expected, the employees had only an imperfect recollection of the exact timing and amount of their past wage increases. Nevertheless, the work force is apparently a close-knit group which is not adverse to discussing their wages among themselves. The witnesses were generally familiar with the wages paid to their fellow employees – many of whom were friends, and some of whom were relatives or spouses. For example, during at least part of the time when Ms. Teather was working as a part-time employee her mother was working as a full-time employee. Similarly, both Mr. Borchel and his wife worked at the hospital. Ms. Teather testified that her evidence was based not only upon her own experience, but upon her observations of the pay stubs of other employees. In addition, some of the witnesses had, from time to time, changed status becoming "full-time", "part-time" or "call in" as the case may be. They thus had the opportunity to observe first hand whether there was any change in their hourly rate associated with this change of status.

7. Despite considerable imprecision as to the amount and timing of the wage increases, one consistent pattern did emerge: the full-time, part-time and relief employees have always been treated the same. Employees within a particular job classification received the same basic wage regardless of their status; moreover, whenever a wage increase was granted to full-time employees, part-time employees and relief employees received a similar increase. All of the witnesses agreed that the respondent followed a principle which was described as "equal pay for the same work." All of the employees performing a particular job got the same rate, regardless of their full-time, part-time or relief status. It was for this reason that the part-time employees were surprised when they did not receive the same increase as the full-time employees, since this was a variation from what they considered to be

a long established pattern of granting them benefits on the same basis as the full-time employees. This departure from past practice was also inconsistent with what they considered to be the respondent's intention as evidenced by its notice of October 27th, 1978 (which it will be recalled was directed at *all* employees.)

8. This general pattern of similar treatment was confirmed by the evidence of Mrs. Helen Brown, the respondent's payroll supervisor. Mrs. Brown has exercised her responsibilities for some sixteen years and was much more familiar with the actual pattern of wage increases than the individual employee witnesses. Mrs. Brown produced for the Board certain extracts from the respondent's personnel records indicating the wage changes for three particular job classifications since 1968. These extracts did not make a comparison between full-time, part-time and relief employees performing these same jobs, however, they did indicate the general trend, and this information was supplemented by her *viva voce* evidence. From 1968 to 1975 there was an unbroken pattern of January wage increases (as well as a second increase, usually paid during the summer. (After 1975 there is some dislocation in this pattern because of the impact of the Anti-inflation Board, and because of the apparent revision of Ministry of Health guidelines; nevertheless, Mrs. Brown confirmed the evidence of the trade union witnesses that until January 1979 (i.e., the most recent wage increase granted only to the full-time employees) all full-time, part-time and relief employees received the same rate of pay. Mrs. Brown also confirmed that the wage increases had always been "across the board", that is, no distinction had been made between full-time, part-time and relief employees. Mrs. Brown agreed that while the employer's October 27th memo did not specifically promise any particular wage increase, it was reasonable for part-time employees to expect that they would be treated in the same way as full-time employees because they had always been so treated in the past. Until the most recent wage increase this had always been the case. When counsel for the applicant, in cross-examination, asked why there had been this departure from past practice, Mrs. Brown indicated that only the full-time application for certification had been dismissed. The obvious inference is that, but for the pending certification application in respect of the part-time employees, they would in fact have received a similar increase. In any event, as has already been indicated, Mrs. Brown testified that on the basis of the employer's long standing practice, it would have been reasonable for the part-time employees to expect to receive the same benefits as the full-time employees.

9. Section 70(2), read as a whole, manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety; and this view has been consistently accepted and applied in recent cases before the Board. In *Spar Aerospace Products Limited* [1978] OLRB Rep. September 859, for example, the Board was required to consider whether an employer could unilaterally rescind a long established practice of granting annual merit increases – a question similar to that which we are called upon to determine in this case. The Board undertook a useful review of the cases and attempted to extract and clarify the basic principles embodied in them:

"The existing pattern of an employment relationship may contain a prospective element, as illustrated by the Board's decision in *Scarborough Centenary Hospital*, *supra*. In that case the Board concluded that 'rates of wages' must refer not only to the amount actually paid at the date of the imposition of the freeze but also to any amounts promised prior to the freeze that were to be implemented at a time fall-

ing within the period of the freeze. Again, in *Hostess Food Products Ltd.*, [1975] OLRB Rep. Mar. 210, the Board recognized that a prospective element can be contained within a frozen employment relationship pattern, finding a failure to implement a substantial wage increase announced by the employer prior to receiving notice of an application for certification to be a violation of section 70 of the Act.

This recognition of the prospective elements of an existing pattern of an employment relationship gives some meaning to the term 'privilege' in section 70. Some promises do give rise to expectations that harden into privileges, and such privileges are not beyond the reach of the statutory freeze. Two recent Board decisions make this point clear. In *A. N. Shaw Restorations Ltd.*, Board File No. 0242-78-U, the Board held that a union which had waived certain rights under its collective agreement could not adopt a different posture during the statutory freeze and insist upon complete compliance. Even more recently, in *Scarborough Centenary Hospital Association*, Board File No. 0447-78-U, the Board found that section 70 prevented an employer from revoking the privileges of free parking for the period of the freeze. It should not be surprising, then, that the Board has interpreted section 70 as freezing not just existing wages, but also any firmly established promises relating to future wages.

The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit."

Ultimately, the Board decided that the practice of granting annual merit evaluations and increases was sufficiently well entrenched as to become a benefit which employees reasonably expected to receive and which was therefore a "privilege" within the meaning of Section 70 of the Act. The Board reached the same conclusion in *Lennox and Addington County General Hospital*, [1978] OLRB Rep. Sept. 843 where the breach of Section 70 consisted of a failure to pay annual wage increases in accordance with a long established policy. Similarly, in *Public Service Alliance of Canada*, [1978] OLRB Rep. Sept. 854, the employer (who in this case was itself a trade union) had an established practice of adjusting the working conditions of its employees to match those of the federal public servants for which it bargained; and the Board found that the statutory freeze required the continuance of this pattern of automatic revisions.



10. Section 70(2) preserves not only the employees' terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term "privilege" is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a "right." In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case since privileges can arise from established custom, practice, or policy. The question is an evidentiary one for, by definition, the Board's consideration must go beyond the strictly legal incidents of the relationship ("rights") and include those aspects of the relationship which give rise to "privileges."

11. In order to demonstrate the existence of a privilege, it is not necessary to establish a contractual right, a formal written policy, or an express promise. It is sufficient if there is an established, and well entrenched, course of conduct which gives rise to the reasonable expectation that a benefit, previously given, will be continued. In this case the Board is unanimously of the view that such a pattern exists. As the respondent's payroll supervisor candidly admitted, the full-time and part-time employees have always been treated "the same" with the sole exception of the latest wage increase. Mrs. Brown also candidly admitted that, having regard to the employer's past practice the part-time employees quite reasonably expected that this policy would continue. This expectation was, of course, reinforced by the employer's October 27th notice which suggested that a general salary re-evaluation for *all employees* would be forthcoming in the near future. In the circumstances, therefore, the Board is satisfied that the respondent's failure to grant the same salary increase to part-time employees as it granted to full-time employees was an alteration of a privilege. Counsel for the respondent put great emphasis on the fact that the most recent wage increase had been described by the employer as an "interim" wage increase. It was submitted that because the employer had not previously granted "interim" wage increases there was no established practice which could be characterized as creating a privilege. The evidence indicates that following the imposition of the Anti-Inflation guideline, various wage increases were regarded as "interim", at least in the sense that they were subject to the approval of the Anti-Inflation Board; but in any event the privilege established was with respect to common treatment for full-time and part-time employees. There is no doubt that the employer has failed to follow its practice in this regard.

12. In the result, therefore, the Board finds that there has been a breach of Section 70(2) of the Act. There remains the question of the appropriate remedy. It was submitted that the Board could not require the employer to pay to the part-time employees the same amounts that had been paid to the full-time employees because such an order might run afoul of the Anti-Inflation guidelines. It was admitted, however, that no application had been made to the Anti-Inflation Board for approval of the wage increase granted to the full-time employees and it is by no means clear that, as of this date, the Federal guidelines have any application to the part-time employees in this bargaining unit. The application of the "business as usual" principle referred to above requires that the part-time employees be treated in the same manner as the full-time employees, and that wage parity be maintained. Our decision is based upon the documentary and *viva voce* evidence which demonstrates a long standing historical relationship between the wages of full-time and part-time employees. Indeed, the effect of our order is simply to maintain this pattern. If the Anti-Inflation Board should subsequently determine that the application of the Federal guidelines pre-

vents the wage payment necessary to maintain this long standing relationship, then that is a matter which will have to be pursued in that forum.

13. The Board, therefore, orders that the employer continue its established practice of treating part-time and full-time employees in the same manner by paying to the part-time employees a 15 cents per hour wage increase from January 12th, 1979 and, in addition, a retroactive wage increase calculated on the same base as that already paid to the full-time employees. The intention of this order is to put the part-time employees in the same position as they would have been in had they been granted the same benefits, at the same time, as the full-time employees. The Board will remain seized of this matter in the event that there is any difficulty in implementing its decision.

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**0278-79-R** Amalgamated Clothing and Textile Workers Union (Toronto Joint Board), (Applicant), v. **Straton Knitting Mills Limited**, (Respondent), v. Group of Employees, (Intervener).

**Certification – Interference in the Trade Union – Employer speeches and letters suggesting lay-offs and shorter hours – Whether section 7a applicable.**

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *Martin Levinson, James Hayes, Frank Aquino and Tony Pileggi for the applicant; C. E. Humphrey and N. Appel for the respondent; no one appeared for the intervener.*

**DECISION OF THE BOARD;** August 9, 1979

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, designers, sales and office staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. Based on lists filed by the employer the Board finds there to be 137 employees in the bargaining unit found appropriate for collective bargaining, and the applicant filed evidence of membership that 72 such persons were members of the applicant (54.0%).
5. The applicant requests that the Board exercise its discretion under Section 7a of the Act and issue a certificate to the applicant. The applicant's allegations of activity by the respondent which contravened the Act are rooted in three meetings of employees held on

company time and addressed by one of the owners, and in respect to the circulation of a petition in opposition to the union.

6. The respondent is engaged in the cutting and sewing of T-shirts and the knitting of sweaters on a contract basis with other manufacturers as well as under its own label. Mr. Norman Appel, a co-owner and active in the management, testified that on March 1st he met separately with five groups each consisting of about 20 employees. He addressed the employees reading his handwritten notes prepared for that purpose. An Italian interpreter and a Portuguese interpreter one of whom was a forelady and the other an employee were used. There were questions raised by employees and answered by Appel. Meetings were held on company premises and time. The following is the text of Appel's prepared notes:

"Ladies

I'm calling the meeting to have the chance to speak to you personally without the supervisors.

I have been with this company full time for two years. In that time I have tried hard to build a business and since our competition is very tough I have unfortunately not had the time to spend with the concern of the employees as much as I would like to.

I know and you all know that the union is attempting to organize the shop. I'm going on record to say that I am definitely not anti union and I also say most strongly that no employee will be picked on or fired because they want to join the union.

We have called this meeting to give you an insight into our problems. I would also appreciate hearing your problems and if you give me a reasonable length of time I will try to clear up these problems without the need for a union. If I fail to clear up your problems you certainly may go after the union.

- (1) With the union it is a fact that the company and the employee grow apart, because the employer no longer deals with the workers, but with the union.
- (2) With a union you will have union dues to pay.
- (3) With a union there are possibilities of strike with loss of pay and customers.
- (4) We do a lot of contract work which is very low profit. Any increases in our rates for whatever reason could cause us to lose these contracts.

We are a young small company and any money made has been put back in the company and has provided more jobs. Even this building is mortgaged for the full amount of the purchase price, and on my personal signature the bank has financed our expansion.



In spite of the fact that we have a large bank debt, we have tried to make lunchrooms, good clean washrooms and a pleasant place for you girls to work in. We also instituted an employee plant committee when we moved into this building. We are not perfect, but we will continue to do our best to improve conditions for our employees.

Now I would like some of you girls to talk to me and tell me personally of any problems you may have."

Appel states he read the notes verbatim although there may have been the odd interruption to which he responded. He also states that there was a question and answer period in which items raised included overtime premium over 40 hours per week, equal pay for equal ability, complaints about length of time spent in washrooms by some employees.

7. Victor Gabinet, a witness who works in the cutting room testified in English that he attended the first meeting at which both owners, Appel and Zweit were present along with Lou Whitson, the plant manager, and that in addition to about 10 cutting room employees there were 40-50 sewing department operators. According to Gabinet's testimony Appel stated as follows:

"I have a contract from National Knitting in my hand. This is a union shop. These people are only making \$3.00 per hour. Then he was saying we had a lady in the cafeteria who was working for the union shop and because it was a union shop she was working three days a week. He said the union is trying to get into this factory but the union does not know our financial position. We have just bought the building. If the union gets in we might lose some contracts, and he mentioned the union are famous for strikes and that the union might demand more money than we can pay. We might be forced to close the place. He mentioned we want to be the best paid company in Toronto. One lady got up and said 'How come I don't even get minimum wage?' Mr. Appel said 'We'll look into it. You will get your money'".

Gabinet also testified that Appel stated: "If you people have any problems you can come directly to us". He mentioned having a Committee and if people have any problems go to the Committee.

8. Later in his testimony, Gabinet reiterated that Appel stated "If the union comes in we might lose contracts. We'll be forced to work 3 days per week instead of 5. We won't work complete 52 weeks we'll be working less".

9. Mrs. Vankel McLean, who testified in English, is a sewing machine operator. She was uncertain as to whether the group meetings held were the initial meeting with Appel or the second such meeting. However, she agrees that it was at the group meeting that dialogue over employee problems was invited. She testified that in the group she attended the issue of higher wages was introduced, as was a request for weekly payment of wages and overtime. Her recollection is that it was at this meeting that Appel made some reference to Great Britain and referred to two newspaper "letters to the Editor" which had been posted on the bulletin board. One of these postings expressed a view that trade unions had brought Britain to

a state of chaos and urged readers not to let it happen here; the other commented on a strike and subsequent settlement at Puretex Knitting Company and expressed the view that loss of wages by strikes was disproportionate to ultimate gains and that unions were undermining the economy.

10. Mrs. Giovanni Mastroracova, who testified through an Italian interpreter, said she was present at the first meeting in the group including the Cutting Room employees. She testified as to what was said as, "First, Norman (Appel) told us he knew the union was entering and if the union entered there won't be work for everybody. Now we are working 52 weeks per year but when the union comes we will work about 3 days per week, and that if the union gets in Adidas and John Newcomb we will have to eliminate them. When the union enters we won't work anymore for those company's we will just work for the smaller ones. But anyway I will do my best to make you have what you want". The Board is uncertain whether this testimony relates to the first meeting held or the second meeting inasmuch as the witness later referred to a second meeting which she attended and which she clearly identifies being in a group of 10 employees. In respect to this meeting at which Appel spoke she testified that "everybody was speaking about union and then we told questions and Norman (Appel) answered". "Norman said, when the union gets in there's no work, he's going to close the factory, and what you want ask me and I'm going to give it to you". She stated that questions were raised about overtime pay, freedom to go to washrooms. The witness also stated that a reference was made to the National Knitting Co. although it is clear to the Board that this reference took place at the second meeting. In any event the witness testified that Appel in a reference to the union said "they made us to pay \$8.00 per month for nothing".

11. Appel's testimony clearly establishes that a second meeting was held March 30th. Gabinet's testimony in respect to this meeting was, "Only difference from first meeting was that he (Appel) mentioned that for the hardworking people he will give more money. He will talk to each person individually. Pretty hard to remember which meeting it said, but he said union will try to get in touch with you. You don't have to talk to union. Union isn't free you have to pay for it". The testimony of McLean and Mastroracova has already been referred to above.

12. Appel's notes which he read verbatim, aside from references to comparative wage scales in the National Knitting contract, read as follows:

"Since the last time we had a meeting, I became interested in unions and have tried to find out their advantages and disadvantages.

If you ask me if I am against unions, I tell you I definitely am not. There are shops in the city where working conditions are bad. The boss is not interested in his workers. They are threatened when they ask for a raise. We certainly are not that kind of people and we intend that our wages and working conditions will be equal to or better than our competitors. (Quote National Knit.)

We cannot do the work ourselves and we need cash and everyone of you girls and it is my belief that you do not need a union to look after your interests.

As mentioned before any employee may join a union without fear of discrimination, but I would like you to be aware of the following.

- (1) Unions cost money in the form of initiation fees, regular dues, possible assessments and loss of pay in the event of a strike.
- (2) Unions affect the relationship between worker and management. I do not believe management is always right and any employee can come to me as an individual and any grievance may be settled at once. I do not believe you have to pay a representative to do this for you.
- (3) In a union shop you must pay dues whether you want to or not. You are forced to pay to keep your job.
- (4) Unions may be the cause of violence, strikes, picket lines and lost pay.
- (5) Unions may be the cause of hard feelings in a shop. Some employees are for the union, some against. This can lead to arguments, hurt feelings and disruption to the employees and the company.
- (6) I told you at the last meeting that there is not a great company with big money behind it. Your company has grown mainly in the last 24 months, based on a 100% mortgage on this building and very large bank loans. Any money made has been put back to build the business and has supplied more jobs. Len and I have not had a raise in two years since we feel the company cannot absorb any avoidable increases.

The most important thing I have to tell you is that you have enjoyed job security and are able to work 50 weeks a year. In these times of rising prices, car payments, mortgages, it is important to all of us to bring home a regular pay check all year long. We are really trying our very best since you all know that wages are under review and increases are being made retroactive.

We have a large amount of low profit contract work from Adidas, Harvey Wood and Jockey. If it becomes necessary to increase our prices, we may lose this business and if we do lose this business we may not work 50 weeks a year.

You may be approached by outside people on the phone in the street or in your home. These people may not be aware of the financial condition of this company and any offers or promises made should not be taken as a guarantee.

I would like you to remember you now have the opportunity to work 50 weeks a year and the company tries hard to ensure that you are able to do so.



Also remember it is your legal right to join or not join a union, and you do not have to talk with organizers if you do not want to of your own free will.”

Appel is positive in his evidence that there were no questions from employees and no dissension at this meeting and that he did not depart from his prepared text.

13. While witnesses were confused as to which statements were to be attributed to the first meeting or the second meeting, there is no dispute that statements were made relating the potential appearance of the union to profitability and to hours of work both weekly and annually, including the possibility of being forced to close, to the adverse impact of unions on the economy generally and equating unions with strikes. Appel's notes for the second meeting touch on all of these items and it is a fair inference to believe they were also dealt with in the unstructured part of the first meeting. Appel, in his testimony before the Board, makes no reference to these matters being raised in the first meeting nor were any direct questions put to him about these portions of testimony by the applicant's witnesses. We also note that Whitson, the plant manager, who gave testimony and who was identified by Gabinet as having been present at the first meeting, gave no testimony in respect to these items.

14. On March 9 a notice was posted in the plant which read as follows:

“To the sewing staff:

Ladies we appreciate you discussing your problems with us. As a result the company has decided the following:

1. Time and a half will be paid on work performed in excess of 40 hours.
2. To set up a system where qualified employees doing the same job get the same basic pay after a 3 month probation period.
3. As a result of your requests we are going to establish a ticket system, so that those of you who wish to work harder and produce more than a standard amount your pay will be raised based upon the extra production.
4. We wish to confirm what was said at the meeting that every employee is free to join a union of her choice without fear of penalty or discrimination. That every employee is free to refuse to join a union, no employee should be pressured. We hope that you will not join a union but will give us an opportunity to learn about your problems and concerns, so that we may correct them and make improvements where possible.

Thank you again,  
Norm Appel  
Len Zweig”

We were also told that the Company set up a Safety Committee, as required by law, in Feb-

ruary and decided to also use this Committee for discussions with employees regarding other employee complaints. It was as a result of these discussions that the respondent commenced a program of meeting with all individual employees in connection with a review of individual rates of pay. Such individual interviews by Whitson commenced in March and continued through April and May. In these interviews Whitson, in relating pay level and productivity, "explained by example that if Company didn't get a fair return on investment it would be better for them to invest elsewhere".

15. On May 1st, Appel called a final employee meeting with the sewing machine operators at which he read the following, and at which no interpreters were used.

"Ladies

I must be brief. I have a personal problem and may not be able to speak to you for the next few weeks.

You are constantly being approached by outside people. Please remember any promises they make are not a guarantee. As I have told you before any increases could have a bad effect since increased costs could possibly cause us to lose contracts. At our present level we are losing some work and we are trying hard to see that this does not continue.

Also any person who feels they must fool the boss when they wish to join the union need not worry. That is your privilege.

However I suggest you look at the governments of Italy and particularly England. After many years the people chose to vote for a Conservative government. Apparently they thought it was best for them. However, this is something for each of you to decide. Our concern is for the future of this country and this company.

I cannot give everyone raises continuously, but those people who perform well will certainly be looked after and we hope that those people who do not perform well will ask their supervisors for help so that they too may increase their earnings.

Thank you."

In response to a question in cross-examination as to whether he departed from his notes, Appel replied "it's possible on that one occasion I did".

16. McLean's version of Appel's remarks on this occasion was that "He said this is the last meeting he will have with us – he won't speak with us anymore. He didn't want the union. Not really against it but he didn't want any of us to go and join it. He said any girls sneak behind his back and join it, he will know. He said union is no good because even National Knitting only pays \$3.50. If union should come in he will have to pay us more money and he can't really give his salesmen the price he is now giving them because he has to pay us more money. We have job now for every week in the year but if union comes in we

couldn't have that he would have to lay off. Then the 4:30 bell goes so not translated into Italian. Everybody left to go home". The Board notes that no questions were put to Appel in respect to McLean's version of the meeting.

17. On Friday May 2nd the Board's notice to employees of application was posted, and on Monday and Tuesday following there was a petition to oppose the union in circulation in the sewing room. We were told by Talia De Angelis who testified through an interpreter that she was approached by a Bianca Plazi twice on the Tuesday and that on one of the occasions the forelady Maria Trionni was about three feet from her. De Angelis also testified that over the two day period she observed two other employees, also seeking signatures on the petition. De Angelis states that during this two day period Trionni, the forelady, spoke frequently to those persons circulating the petition at their work stations which were physically separated in the Sewing Room. De Angelis says "Trionni didn't speak with me or the others but only those three".

18. Gabinet also testified that he was asked to sign a petition while at work in the Cutting Room and that this occurred immediately after Whitson had been present in the department and talked with the foreman and with what appears to us to be a lead hand cutter, and a few minutes later a Juanita Conchita came to Gabinet with the petition. Gabinet states the foreman was present when he was approached about the petition and the foreman walked away.

19. The evidence makes clear that the respondent was not in favour of his employees organizing, and that, in itself, would neither be a surprise to employees nor a contravention of the Act. The question before us, however, is whether the expression of those views in total may be objectively considered to have had a coercive or intimidating effect on employees such as to make it unlikely that a representation vote would disclose their true wishes as to whether they desire to be represented by the applicant in collective bargaining. It is really a question in this case as to whether the respondent's conduct is likely to have transformed the issue in the minds of employees on which employees would be asked to vote in a representation election from one of "do you wish to be represented in collective bargaining by the applicant" to one of "do you want continued full and steady employment".

20. In evaluating the total circumstances here the Board does so within the format stated in the *Bell and Howell* case, [1968] OLRB Rep. Oct. 695 where it was said,

...it is important to appreciate the sensitive nature of the relationship that exists between employees and their employer. The Board succinctly expressed both the nature and the effect of that relationship in the *Pigott Motors (1961) Limited case* CLLC Vol. 2, 1960 – 64 para. 16, 264 at p. 1130 in the following words,

'In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.'



21. In the instant case the message which must clearly have come through to employees was that the respondent did not want a union and that if there was a union there would be lay-offs, short weeks and perhaps a closure of the business. We do not think the respondent's disclaimers of not being against unions in general or his assurances that employees need not fear retaliatory action for joining the union would be objectively received at face value when the respondent in the next breath is making it clear that unionization may destroy the total enterprise: nor can the circulation with the tacit consent of the respondent of a petition opposing the union following close on the heels of Appel's last address to employees have done anything other than to solidify in the minds of employees the employer's opposition. We think the language of the Board in the *Winson Construction Limited* case [1976] OLRB Rep. Nov. 714 are particularly apt to the instant case, where it is said at para. 15:

"No general rules can be set down as to what circumstances might justify a conclusion that employee desires are not likely to be ascertained in a representation vote. Rather, each case must be decided in its own particular facts. In some instances the actions of an employer may be such that a determination that a vote would not be reflective of employee desires may be very easily arrived at. *For example, a warning to employees that the certification of a trade union would result in lay-offs and shorter working hours would, lacking any other considerations, tend to have such an intimidating effect that employees might reasonably be expected to refrain from voting for the union no matter what their true feelings about being represented by it.* (See: *General Mills of Canada Ltd.* File No. 7411-74-R.) In such a situation to vote in favour of being represented by a trade union might well appear to employees to be tantamount to voting themselves either out of job, or at best, a drop in pay ..." [Emphasis added]

22. The Board finds that the respondent's activities are in contravention of Sections 56 and 58(c) of the Act and that as a result of such contraventions the true wishes of the employees are not likely to be ascertained through a representation vote. The Board finds that the applicant has membership support adequate for the purposes of collective bargaining in the unit found by the Board to be appropriate.

23. A certificate will issue to the applicant.

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**0755-79-U** Gordon F. D'Eri, Complainant, v. **T.I.A. Limousine Operators Association**, Respondent.

**Discharge for Union Activity – Employee – Parties – Section 79 – Whether supervisor entitled to relief under sections 58 and 79.**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members M. J. Fenwick and F. W. Murray.

**APPEARANCES:** *Gordon F. D'Eri for the complainant, Tim Sargeant and P. J. Strain for the respondent.*

**DECISION OF THE BOARD;** August 30, 1979

1. The name "Toronto International Airport Limousine Operators" appearing in the style of cause of this application as the name of the respondent is amended to read: "T.I.A. Limousine Operators Association".
2. This complaint under section 79 of *The Labour Relations Act* has been brought by the grievor in his own name. The grievor alleges that he has been discharged from his employment contrary to the provisions of sections 56 and 58(c) of the Act. He believes that he was discharged because the employer thought that he had been active in the formation of a trade union.
3. The respondent's reply indicated that it would take the preliminary position that the grievor is not entitled to the relief sought. At the hearing counsel for the respondent elaborated that position by arguing that the grievor was not an employee for purposes of the Act because he exercises managerial functions within the meaning of section 1(3)(b) of the Act, thus he could not avail himself of relief under section 79. Counsel submitted that this was the result of the Board's consistent interpretation of that section since the decision of the Supreme Court of Canada in the *Associated Medical Services Ltd.* case, 64 CLLC ¶15,511. Counsel relied particularly on the Board's decision in *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751.
4. In the latter case the Board was dealing, amongst other issues, with the issue of whether the protections of sections 56 and 58 of the Act were available to persons who exercise managerial functions within the meaning of section 1(3)(b) of the Act. The Board held that section 56 was a section of the Act which protects a union and not an individual and such a complaint, in the Board's words "... must be brought by the union and cannot be asserted by the managerial employee alone." In dealing with section 58 of the Act, the Board adopted the same interpretation of that section as did the Board in *Ottawa General Hospital*, [1974] OLRB Rep. Mar. 193 and concluded that the employee protections set out in section 58 of the Act apply only to the persons entitled under the Act to join a trade union and to participate in its lawful activities. In other words the protections apply only to persons who have a protectable right to join a trade union and management employees are expressly excluded from this right by operation of section 1(3)(b) together with section 1(1)(n) which defines a trade union. (In this respect see also the Board's comments at paragraph 24 of *Ottawa General Hospital*, [1974] OLRB Rep. Oct. 715.) All three of these cases acknowledge that the effect of the Supreme Court decision referred to above was to restrict the word "person" in section 58 to "employees" as defined by the Act.

5. While the Board in *A.A.S. Telecommunications, supra*, was dealing with a managerial person it is clear from its statement that a section 79 complaint alleging a violation of section 56 of the Act must be brought by a trade union and cannot be brought by an individual employee. For this reason, the complaint in respect of section 56 in the instant case is dismissed. Furthermore, for the same reasons as stated in both *Ottawa General Hospital* cases and in *A.A.S. Telecommunications, supra*, should the Board find that the grievor exercises managerial functions within the meaning of section 1(3)(b) of the Act, he would not be an employee for purposes of section 58 and, therefore, would not be entitled to the relief sought under section 79. In the result, the section 58 complaint would be dismissed.

6. Since the parties disagree as to whether the grievor exercises managerial function, the Board appoints Mr. N. Harper, Labour Relations Officer, to inquire into the duties and responsibilities of the grievor in his services with the respondent at the times material to the complaint.

7. The Board directs that, if the grievor intends to proceed with the complaint, he is to furnish the respondent and the Board with a concise statement of all material facts upon which he intends to rely in support of the allegation set out in the complaint, but not the evidence by which the material facts are to be proved. The statement of material facts is to be provided, as directed, within ten days after the date when the Labour Relations Officer first meets with the parties.

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**0333-79-U** Graphic Arts International Union, Local 35-P, (Complainant), v. **Toronto Star Newspapers Limited**, Printing and Graphic Communications Union No. N-1, (Respondents).

**Bargaining Rights – Duty to Bargain in Good Faith – Jurisdictional Dispute – Purpose of section 81 reviewed – Bargaining to impasse over work jurisdiction – Resorting to economic sanction over work jurisdiction bargaining in bad faith.**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members D. B. Archer and C. G. Bourne.

**APPEARANCES:** *Harold F. Caley and Robert Rusk for the complainant; Derek L. Rogers and Jack Seymour for the Toronto Star; Alick Ryder for Printing and Graphic Communications Union No. N-1.*

**DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER; August 20, 1979**

1. This is a complaint filed under section 79 of *The Labour Relations Act* in which Graphic Arts International Union Local 35-P (hereinafter referred to as the photoengravers), the complainant, alleges that the Toronto Star Newspapers Limited (hereinafter referred to as the Star) and the Printing and Graphic Communications Union No. N-1 (hereinafter referred to as the Sterotypers), the respondents, have violated sections 3, 14, 35, 40, 41,



56, 58 and 59 of *The Labour Relations Act*. The complaint deals with the conduct of the respondents in the current round of negotiations between themselves and between the Star and the complainant photoengravers for renewals to collective agreements which expired December 31, 1978. In essence the complainant alleges that the Star and the sterotypers have made an agreement which encroaches upon the established bargaining rights of the photoengravers by extending recognition to the sterotypers over employees who, until this time, have been represented by the photoengravers. In addition the complaint alleges that the Star and the sterotypers have used the negotiating process to circumvent the jurisdictional dispute procedures of the Act.

2. The recognition and work jurisdiction clauses contained in the expired photoengravers' collective agreement which are relevant to a determination of this matter are set out below:

#### *"ARTICLE 1*

SECTION 1. The Employer hereby recognizes Graphic Arts International Union No. 35-P, G.A.I.U. as the exclusive bargaining agent of all employees engaged in the process of photo-engraving and its attendant work in the production of the Employer's publications as defined in Article 2, Section 2 hereunder, the said employees forming a group who are and have for many decades been members of a craft and Graphic Arts International Union No. 35-P, being a trade union pertaining to such craft.

#### *ARTICLE 2*

SECTION 1. Except as hereinafter provided, none but members of the Union in good standing shall be employed to do any work which comes under the jurisdiction of the G.A.I.U. This provision includes Superintendents and Foremen but only bonafide non-working Superintendents shall not come within the context of this agreement as long as they remain as such. No member of the Union shall be required to handle work which emanates from offices where an authorized legal strike of the G.A.I.U. exists, or to cross a picket line in instances where a strike has been authorized by the G.A.I.U.

SECTION 2. The parties to this agreement have, at the date of this agreement, agreed upon a definition of the operations now included in the process of photoengraving in the Employer's operations. The process of photo-engraving and its attendant work is defined as being and is the operations in the following processes: in the letterpress process the operations pertaining to the production of photo-engraving from copy, original or subject up to the finished product; in the offset, gravure and other kindred processes all operations from the copy, original or subject up to the finished product ready for the press including but without limiting the generality of the foregoing, Photography Retouching, Stripping, Printing, Etching, Finishing, Engraving, Electronic Platemaking, Ben Day (Tint Laying), Proofing and Marking of Proofs for

Color Corrections, Routing, Blocking, Making of Masks for Color Separations and for Drop Out Purposes on Plates or Negatives and Making of Blue, Silver or Velox Prints and more specifically, in Rotogravure, the process includes, but without limiting the generality of the foregoing, such operations: (1) Photography; (2) Etching, Staging, Sensitizing, Carbon Printing, Marking of Proofs for Color Corrections; (3) Retouching, Rotogravure Layout; (4) Cylinder Grinding, Polishing, Plating, Depositing; (5) Engraving.

# SUPPLEMENTAL AGREEMENT TO THE MAIN AGREEMENT

(AND FORMING PART OF THE MAIN AGREEMENT)

BETWEEN

TORONTO STAR NEWSPAPERS LIMITED

AND

GRAPHIC ARTS INTERNATIONAL UNION NO. 35-P, G.A.I.U.

Dated At Toronto on the 4th day of July, 1977

Re: NAPP PLASTIC PATTERN PLATE AND NAPP DIRECT PLASTIC PRINTING PLATE

(A) Subsections (B) and (C) of this clause constitute the assignment of jurisdiction to the Union over the process of making Napp plastic pattern plates (or other plastic pattern plates which are processed and used in a like manner) and Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) only.

(B) With respect to Napp plastic pattern plates (or other plastic pattern plates which are processed and used in a like manner) letterpress photoengraving work shall consist of the making of negatives through to completion of the pattern plate.

(C) With respect to Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) letterpress photoengraving work shall consist of making of negatives and any stripping of the negatives which may be required in the processing of such printing plates but shall not include printing frame exposure of negatives to plate, washout or developing and the preparation of such plate for attachment to the press.

GRAPHIC ARTS INTERNATIONAL UNION NO. 35-P, G.A.I.U.

Per:

Per:

## TORONTO STAR NEWSPAPERS LIMITED

Per:

Per:”

To reiterate, this complaint is in respect of the photoengravers’ claim to exclusively represent those doing the work described in article 2 and more specifically in the supplementary agreement first negotiated in 1977 re NAPP Plastic Pattern Plate and NAPP Direct Plastic Printing Plate and what it views as an attempt by the Star, and more recently the stereotypers, to interfere with and diminish its recognition in this regard.

3. The instant complaint has its roots in a prior complaint filed by the photoengravers on February 14, 1979, decision reported [1979] OLRB Rep. May 451. The earlier complaint flowed from offers of settlement extended by the Star to both the stereotypers and the photoengravers which contained the provision that “the assignment (including the processes and equipment involved in the making of direct printing plates) shall be at the sole discretion of the employer.” In addition, the offer of the photoengravers contained the following provision:

“Should the employer assign jurisdiction of direct printing plate making to a union other than the Graphic Arts International Union No. 35, G.A.I.U. including the making of negatives and any stripping of negatives, the terms of Article 2, Section 2 of the main collective agreement may be declared null and void by the Employer which shall have the sole discretionary right to reassign this work in whatever manner it deems appropriate for the efficient operation of its business.”

Article 2, Section 2 of the photoengravers’ agreement has been set out above.

4. In response to the position tabled by the Star the photoengravers maintained that the issue of jurisdiction between itself and the stereotypers in respect of the introduction of direct plastic printing plates had been settled in the previous round of bargaining on the basis of the terms of the supplemental agreement and that any attempt to lessen its jurisdiction constituted an unfair labour practice. The complaint filed with the Board and the submissions of counsel for the photoengravers in that case are summarized at paragraph 9 of the Board’s earlier decision as follows:

“Counsel for the complainant argued that the conduct of the two respondents amounted to an interference with the bargaining rights of the complainant. According to counsel, the bargaining position assumed by the Star would have the effect of leaving it free to cut down Local 35-P’s representation rights by assigning the work performed by its members to other employees represented by another union. The respondent union, moreover, by indicating that it would claim all of Local 35-P’s work jurisdiction would also be interfering with the bargaining rights of Local 35-P. Such an encroachment upon its bargaining rights would not only be inconsistent with the scheme of the Act as set out in sections 3, 35, 41, but would also amount to a direct contra-



vention of sections 56, 58, 59 of the Act. The Star's bargaining position, accordingly, amounted to a failure to bargain in good faith in breach of section 14 of the Act since it amounted to both a refusal to recognize the union and a demand that would give rise to illegal conduct. According to counsel for the complainant, the Star had wrongfully placed on the bargaining table the issue of the very survival of Local 35-P as a bargaining agent at the Star."

5. In dismissing the earlier complaint the Board characterized it as a "latent jurisdictional dispute." While recognizing that the Star's proposal might eliminate the demarcation line between the two unions and result in a different work assignment under the new collective agreement, the Board refused to equate the potential reassignment of work with a diminution of the union's bargaining rights or recognition and stated that the claim for the work in question "should be asserted through the jurisdictional dispute provisions under section 81 of the Act and not by means of an unfair labour practice complaint." In support of its conclusion the Board reasoned at paragraphs 11 and 12 of its May 3, 1978 decision as follows:

"It is evident that the arguments of Local 35-P rest firmly on the assumption that bargaining rights and work jurisdiction can be equated. Since the Star's offer creates the potential for a reduction of Local 35-P's work jurisdiction, that union concludes that there would be a corresponding reduction in its bargaining rights. As a general rule, however, there is no exact equation between bargaining rights and work jurisdiction. As the Board stated in *Metropolitan Toronto Apartment Builders Association*, [1978]OLRB Rep. Nov. 1022, at p. 1034:

'Nor can it be said that the subcontracting clause interferes with another union's bargaining rights contrary to section 56 and 59 of the Act. In the Board's view, there is no exact equation between bargaining rights and work jurisdiction, as the complainant attempted to make out. While the Board recognizes that, without a supporting work jurisdiction, bargaining rights in the construction industry may wither, the two concepts are not congruent. Under *The Labour Relations Act*, bargaining rights acquired either through the certification process or by voluntary recognition only entitle a union to be recognized as the exclusive bargaining agent for a particular group of employees. The bargaining rights conferred by law do not give a union any particular work jurisdiction, and any claim to a work jurisdiction must be asserted and established in the bargaining process through such means as a subcontracting provision. Sections 56 and 59 of the Act are intended to protect bargaining rights only, and these sections cannot be interpreted as providing protection to a work jurisdiction. Conflicting claims to particular work receive much different legislative treatment, being subject to the procedure established in section 81 of the Act for the resolution of jurisdictional disputes.'

While the Board recognizes that bargaining units are often defined in

terms of certain job classifications or work categories, these descriptions do not mean that the bargaining agent has an absolute right to the work being performed by the group of employees falling within such job classifications. The reference to work categories in the bargaining unit descriptions, although serving to identify the employees falling within the bargaining unit, does not by itself create an unqualified entitlement to that work. The fact is that some other bargaining agent may also have bargaining rights for other employees of that same employer that are defined in terms of different work categories, and some of the work performed by the employees falling within these work categories may overlap to some degree that of the other group of employees. Job categories are not watertight and, in fact, there may be considerable leakage between categories, giving rise to competing claims for work from bargaining agents. This sort of problem, as a general rule, is not treated as one involving representation rights of the competing bargaining agents but as a dispute over work jurisdiction. The Act contemplates that such competing claims to work are to be resolved through the jurisdictional dispute procedures set out in section 81."

In dismissing the complaint on the basis set out above the Board was careful to point out in the final paragraph of its decision that its conclusion did not mean that the Star and the stereotypers could use the negotiation process to weaken the photoengravers' claim to the work in question. The Board stated unequivocally at paragraph 16 that:

"Local 35-P (photoengravers) is entitled under section 81 of the Act to have its claim to the work in question dealt with on its merits. Accordingly, any attempt to circumvent the jurisdictional dispute procedures of the Act by either the Star or Local 1 in their bargaining would be inconsistent with the Act and would amount to a breach of the duty to bargain in good faith."

6. The photoengravers and the Star returned to the bargaining table following release of the Board's earlier decision. The Star tabled a revised proposal dealing with Article 2 and the supplemental agreement re Napp Plastic Pattern Plate on May 16, 1979 which is reproduced below:

*"REVISED COMPANY PROPOSAL RE PHOTO ENGRAVERS AGREEMENT*

Article 2, Section 1 – Delete and replace as follows: –

Except as hereinafter provided, none but members of the Union in good standing shall be employed to do any work which is described in Article 2, Section 2. This provision includes Superintendents and Foremen but only bonafide non-working superintendents shall not come within the context of this Agreement as long as they remain as such. No member of the Union shall be required to handle work which emanates from offices where an authorized legal strike of the G.A.I.U. exists, or to cross a picket line in instances where a strike has been authorized by the G.A.I.U.

Article 2, Section 2 – Delete and replace as follows: –

The parties to this Agreement have, at the date of this Agreement, agreed upon a definition of the operations now included in the process of photo engraving in the employer's operations at 1 Yonge Street, Toronto. The process of photo engraving and its attendant work is defined as including only the letterpress process operations pertaining to the production of negatives, screened negatives (including the opaquing thereof), stripping of negatives, making of veloxes and special screens when such are to be used as part of a full page paste-up which is destined for part of the employer's daily newspaper, but, for greater certainty, shall not include the making of negatives from full page paste-ups or the making of negatives or other photographic work traditionally performed by persons employed in departments other than the Photo Engraving Department.

Article 2, Section 3 – As per existing contract.

Delete Supplemental Agreement set out on Pages 23, 24 and 25 of the Collective Agreement dated January 1, 1977 to December 31, 1978 (see attached).

Delete Supplemental Letter Re Napp Plastic Pattern Plate and Napp Direct Plastic Printing Plate set out on Pages 29 and 30 of the Collective Agreement dated January 1, 1977 to December 31, 1978, and replace as follows:

SUPPLEMENTAL AGREEMENT TO THE MAIN AGREEMENT  
(AND FORMING PART OF THE MAIN AGREEMENT)

BETWEEN

TORONTO STAR NEWSPAPERS LIMITED

AND

GRAPHIC ARTS INTERNATIONAL UNION  
NO. 35-P, G.A.I.U.

Dated at Toronto this      day of      , 1979

Re: NAPP PLASTIC PATTERN PLATE

With respect to Napp plastic plates (or other plastic pattern plates which are processed and used in a like manner) letterpress photoengraving work shall consist of the making of negatives through to completion of the pattern plate.

GRAPHIC ARTS INTERNATIONAL UNION NO. 35-P, G.A.I.U.



Per:

Per:

# TORONTO STAR NEWSPAPERS LIMITED

Per:

Per:”

The following day the Star tabled a “craft settlement package” containing term, wage and vacation proposals and advised the photoengravers that because of a tentative agreement with the stereotypers it was fixed in its position in respect of article 2 and the supplementary agreement. The photoengravers responded on May 18, 1979. They agreed with the “craft settlement package” but refused to accept the Star’s proposed amendments to article 2 and the supplemental agreement and in the result these proposed amendments remained as the only matters in dispute between the parties as of May 18, 1979. Failing resolution the Star asked the conciliation officer who was in attendance at the May 18th meeting to issue a “no-board” report. The “no-board” report was issued on May 25, 1979 with the result that the parties are presently in a legal strike-lockout position.

7. The effect of the Star’s proposed amendment to article 2 and the supplemental agreement can best be understood if the craft function of both the photoengravers and the stereotypers is placed in historical perspective. Reduced to its simplest, the photoengravers have been responsible for the making of the pattern plate from which the stereotyper makes the press plates used to print the newspaper. Technology has advanced to the point where plastic is now used in place of metal in a pattern plate process and will be used in a planned direct plate process. In the pattern plate process, which is currently being used by the Star, the historical differentiation between the photoengraver and the stereotyper is maintained; that is the photoengraver prepares the pattern plate which is delivered to the stereotyper. The assignment of work under the plastic pattern plate process is dealt with in the supplementary agreement found at page 29 of the old collective agreement between the photoengravers and the Star and it is agreed that the amendments proposed by the Star in this round do not affect the existing work assignments under the pattern plate process. In the direct plastic plate process, which the Star intends to use, the historical demarcation between the photoengraver and the stereotyper becomes blurred because the pattern plate is also the press plate, thereby giving rise to a question as to where the work of the photoengraver ends and the work of the stereotyper begins. The supplemental agreement at page 29 of the photoengravers’ old agreement and the corresponding supplemental agreement at page 34 of the stereotypers’ agreement represent a tripartite agreement as to the assignment of work between the two crafts under the direct plate process during the term of the old agreement. The photography and stripping functions of plate preparation were to be given to the photoengravers while the etching function was to be given to the stereotyper.

8. The proposal tabled by the Star on May 16th will alter the assignment of work under the direct plate process, as established under the old collective agreements, to the extent of assigning certain camera work, which would have been performed by the photoengravers under the old agreement, to the stereotypers. Under the Star’s proposal the stereotypers will be responsible for making the negatives of the full newspaper pages assembled in the

photo-composing department. As a result of this proposed change in work assignment the complement of photoengravers may be reduced by four. The evidence of Mr. J. Seymour, the Star's Assistant Production Manager of the Production Department, is that the Star's proposal will result in a more direct flow of work and in the more efficient utilization of those employed as sterotypers.

9. Counsel for the photoengravers argues that the tripartite agreement arrived at between the Star, the sterotypers and itself in respect of the assignment of work under the direct plastic plate process, as embodied in the supplemental agreements found in both the sterotypers' and photoengravers' expired collective agreements establish that those making negatives from full page paste-ups (the camera work in dispute) are represented by the photoengravers. Counsel for the photoengravers stresses the fact that this agreement eliminated competing claims for the work and any possibility of overlapping bargaining rights. The photoengravers take the position that the attempt by the Star to now assign the work in question to the sterotypers and the tentative agreement between the Star and the sterotypers in this regard constitute an unlawful interference with its bargaining rights as established by the prior agreement of the parties. Counsel for the photoengravers maintains that the Star's proposal, if accepted, would diminish its recognition to the extent that 4 of its members who would have done the work will lose their jobs when the direct process is introduced. Counsel argues that in the circumstances there is an "equation" between work jurisdiction and recognition and the Board must find that the attempt by the Star to alter the work assignment agreement is an unlawful attempt to lessen the scope of its recognition. The photoengravers maintain that they have the exclusive right to represent those doing the agreed-upon work of the craft and that any attempt to reassign the work of the craft is an attempt to lessen the scope of its recognition.

10. Counsel for the photoengravers relies on the previous Board decision in support of the proposition that a party to a collective agreement cannot resort to strike or lockout to augment or erode bargaining rights (paragraph 10), that it holds bargaining rights for those who do the work described in the old agreement and any refusal by the Star to bargain with the stero typer on behalf of these employees is illegal (paragraph 13) and finally that any attempt by either of the respondents to circumvent the jurisdictional dispute procedures of the Act at the bargaining table would constitute a breach of the duty to bargain in good faith (paragraph 16). The latter point forms the basis of an alternative position put forward by the photoengravers' union. It argues that the attempt by the Star to force its agreement to the work under threat of economic sanction and the tentative agreement reached with the sterotypers constitute an attempt to circumvent section 81 of the Act and to severely prejudice its case in any subsequent section 81 proceeding. In the result counsel for the photoengravers argues that the Board must find this bargaining conduct to be in breach of section 14 of the Act.

11. Counsel for the Star starts with the proposition advanced in the earlier Board decision that bargaining rights and work jurisdiction are separate concepts not generally congruent and argues that the proposition is applicable in this case. He argues that by the terms of the collective agreement between the Star and the photoengravers the union is not recognized as bargaining agent for all photoengravers in the abstract but rather as bargaining agent for "all employees engaged in the process of photoengraving and its attendant work ... as defined in article 2, section 2." He maintains that the agreement to reference "the process ... and its attendant work" to a mutually agreed description of the work evidences a



recognition of the dynamics of technological change in the newspaper industry. He argues that the parties view article 2 section 2 as dealing with work assignment which is subject to change from time to time and in support relies on the language of article 2 section 2 which describes the photoengraving process "at the date of this agreement" (i.e. 1977) and speaks of operations "now" included in the process, and the history of negotiated change to the work jurisdiction of the photoengravers at the Star. Counsel for the Star maintains that the employer must be able to change methods of production and be able to efficiently utilize manpower, equipment and procedures and that there is nothing in the Act to prohibit him from negotiating towards these ends. The Star reasons that while a change in the description of the bargaining unit work might result in fewer jobs falling within the scope of the photoengravers' recognition, the proposal of the Star recognizes the continuing existence of separate bargaining units and bargaining agencies and maintains the bargaining rights of the photoengravers in respect of all employees doing the work which will be described as photoengraving. If we understand the argument of the Star in this regard it is that any dispute as to the description of the work of the craft must be characterized as one relating to work assignment and not to union recognition where the union continues to represent all those in the craft; albeit with a modified description of the work. The Star maintains that the photoengravers cannot rely on the recognition clause as drafted to freeze work assignments for all time.

12. In reference to the photoengravers' allegation that the bargaining stance adopted by the Star and the stereotypers is in violation of section 14 because it constitutes an unlawful attempt to circumvent the jurisdictional dispute procedures of the Act, the Star maintains that there is nothing in the Act to prohibit an employer from attempting to resolve potential jurisdictional disputes in advance. The Star argues that while its proposal, if accepted, would not preclude a section 81 application in the event other processes were introduced at the Star or an assignment was made contrary to the collective agreement it would resolve a potential jurisdictional dispute in respect of the direct plastic process prior to its occurrence and on terms acceptable to all concerned. It is argued that such a result would be in keeping with the purposes of *The Labour Relations Act* whereby employers and trade unions "fashion the law that is to govern the workplace." It is submitted that if such agreements are lawful, which they must be, it cannot be unlawful to bargain for their establishment or to propose the same or amendments thereto. In the result the Star maintains that it has breached neither section 14 nor section 59 of the Act and asks the Board to dismiss the complaint.

13. Counsel for the respondent stereotypers asks the Board not to place undue emphasis on events occurring since 1977 which, he maintains, ignores the significance of the work assignments of the stereotypers which run back as far as the turn of the century. In particular he asks the Board not to place undue emphasis upon the photoengravers use of the camera under the most recent agreements. Counsel for the stereotypers argues that bargaining over work jurisdiction cannot be characterized as an offence under the Act when the work (i.e. the making of the press plate) falls within the ambit of the function traditionally performed by the union's membership. The stereotypers maintain, as does the Star, that if work jurisdiction is a bargainable issue, as it has been in past rounds of negotiations, then it cannot be an offence to reach an agreement on the issue and indeed if raised at the bargaining table must be addressed under the duty imposed by section 14 of the Act. The respondent union denies that it has in any way circumvented the provisions of section 81 of the Act in negotiating as it has in that section 81 allows the Board to set aside, leave untouched or amend its collec-



tive agreement (if ratified) in any section 81 application brought by the photoengravers. Counsel for the stereotypers interprets paragraph 16 of the Board's earlier decision as meaning that any attempt to oust the jurisdiction of the Board under section 81 would amount to a violation (i.e. any attempt to force one side to contract out of the section). He does not interpret the paragraph as meaning that an agreement which alters work jurisdiction, even in the case of competing claims, amounts to a violation of section 14 of the Act. Counsel for the stereotypers asks the Board not to alter the earlier decision in which the Board found that representation rights and work jurisdiction could not be equated and characterized the issue in this case as one of work jurisdiction. He argues that in view of this distinction and in the face of a legitimate claim to the work, the Board cannot find that the bargaining engaged in by the stereotypers amounts to a violation of either section 14 or section 59 of the Act.

14. Turning to the merits. Other than in respect of the reference to 1 Yonge Street in the Star's proposal this panel has no reason to characterize the complaint before it any differently than did the panel which disposed of the earlier complaint. This panel, as with the previous panel, is of the view that the bargaining unit description defines the complainant's bargaining rights in terms of those employees of the Star who perform certain work as members of the photoengravers' craft. The complainant has the exclusive right to represent all those who do the work as members of the craft. For the reasons found at paragraphs 11 and 12 of the Board's earlier decision, however, the complainant photoengravers do not have an absolute claim to the work nor is the work description frozen for all time absent their agreement to alter it. Whereas the previous panel was faced with an attempt by the Star to bargain for a discretion to assign the work, this panel is faced with an attempt by the Star to negotiate an immediate change to the work description. Although it is now possible to determine how many members of the photoengravers may lose their jobs as a result of the proposed amendment to the work description, the result is not to transform this into a recognition matter.

15. A union holding the bargaining rights for a craft unit of employees, as distinguished from an all employee unit, represents only the employees working within that craft. Regardless of whether the work of the craft is expressly set out in the collective agreement, the bargaining rights of the union representing a craft unit of employees are circumscribed by its established work jurisdiction. Consequently, any alteration in work assignment affects the scope of its representation rights. It follows that the Board is given the authority under section 81, the section of the Act dealing with work jurisdiction disputes, to alter the bargaining unit determined in a Board certificate or defined in a collective agreement as it considers proper for there is an inherent recognition element to many work jurisdiction disputes. This is not to say, however, that there is an equation between work jurisdiction and recognition even where members of one union lose their jobs as a result of a change in a work assignment. If the matter involves an assignment of work between competing unions and not an attempt to deal with other than the bargaining agent recognized for the employees in the craft unit, then it is essentially a work jurisdiction dispute and must be treated as such.

16. The complainant photoengravers rely on the possible loss of 4 jobs and argue that if the matter is not one of recognition and if they are not permitted to rely on section 59 of the Act and the other sections of the Act which maintain a trade union's exclusive bargaining rights, another union or the employer could wipe out the existence of a craft unit under the guise of a change in work assignment. The position of the photoengravers ignores the

existence of section 81 of the Act. The employer cannot unilaterally wipe out the existence of a craft by reassigning the work of the craft, and neither can the other trade union by requiring the work to be reassigned. These actions can found a section 81 complaint and a full hearing on the merits. If in the end result there is a loss of jobs they will have been lost as a result of a work assignment supported on its merits and not as a result of disregarding the bargaining rights of one of the trade unions.

17. While the Board characterizes the complaint before it as essentially one of work assignment, the proposal tabled by the Star makes specific reference to its operations at 1 Yonge Street in contrast to the wording of the existing article 1 section 1 and article 2 section 2. Clearly, if the Star is attempting to restrict the scope of the union's recognition to the street address, as it appears to be doing, it is attempting to lessen the geographic scope of the union's recognition. The Board held in *United Brotherhood of Carpenters and Joiners* [1978] OLRB Rep. Aug. 776 that a trade union could not seek to acquire a voluntary extension of its bargaining rights by threat of economic sanction. The Board found that while the parties may raise the matter in bargaining it is not an issue which could force bargaining to an impasse. The Board reasoned that any attempt to make such a demand the subject matter of a strike was contrary to the scheme of the Act and hence in violation of the duty to bargain in good faith imposed under section 14 of the Act. The Board concluded in that case that:

“Just as an employer cannot use its economic leverage to bargain out of established bargaining rights a trade union cannot use its economic leverage to attempt to extend bargaining rights.”

The bargaining impasse between the Star and the photoengravers has extended into the open period so that either side is free to resort to economic sanctions in support of their respective positions. In the Board's view a strike or lockout is now imminent and in so far as the Star's proposal represents an attempt to restrict the scope of the union's geographic recognition to 1 Yonge Street the Star is in violation of section 14 and must modify its proposal so as it does not impinge upon the geographic scope of the union's recognition.

18. The fact situation before this Board is substantially different than that upon which the Board dismissed the earlier section 14 complaint. Since the issuance of the Board's earlier decision the Star has amended its position so that it no longer seeks a discretion in respect of work assignment but rather is attempting to alter the work description in the collective agreement. All other matters have been tentatively settled so that work jurisdiction remains as the only matter in dispute and the Minister has issued a “no board” report so that the parties are currently in a legal strike/lockout position. In addition the Star has negotiated a tentative settlement with the stereotypers which includes a work description which overlaps with that found in the expired photoengravers' collective agreement. It is against these critical facts that this panel must decide if either or both of the respondents have violated section 14 of the Act.

19. Both respondents rely in large measure on the legality of the work assignment agreements previously negotiated by the parties and argue that if such agreements are legal within the framework of the Act it cannot be illegal to bargain for them. This argument is sound in so far as it goes. The respondents, however, ignore the fact that the negotiations between the Star and the photoengravers have reached an impasse over this very issue and

that a strike or lockout is now imminent. Clearly there is nothing unlawful about attempting to work out an agreement between interested parties and indeed, such agreements are contemplated under the Act and the parties are to be encouraged in this regard. In this round, however, in contrast to the last round of negotiations, the Star and the photoengravers have not been able to reach a voluntary agreement. It is clear that if the work description is to be altered it will be as a result of economic leverage. The Board must assess the bargaining between the parties in light of this fact and in light of the provisions of section 81 of the Act.

20. The relevant subsections of section 81 of the Act are set out below:

“(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers’ organization to assign particular work to persons in a particular union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers’ organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

(8) Where a complaint is made under subsection 1 and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers’ organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.

(9) The Board may in an interim order or direction or at any time after the making of such interim order or direction direct any person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents to cease and desist from doing anything intended or likely to interfere with the terms of an interim order or direction respecting the assignment of work.

(10) The Board shall file in the office of the Registrar of the Supreme Court a copy of an interim order or direction made under this section, exclusive of the reasons therefor, in the prescribed form, whereupon the interim order or direction shall be entered in the same way as a judgment or order of that court.

(11) After an interim order or a direction has been entered it is enforceable by a person, employee, employer, employers’ organization, trade union or council of trade unions affected as a judgment or order of the Supreme Court on the day next after the day fixed for compliance in the interim order or direction.



(18) Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly."

21. The scheme of collective bargaining envisaged by *The Labour Relations Act* involves several related elements: the establishment of the trade union as the exclusive bargaining agent for a defined group of employees; the legal requirements that the union and employer bargain with a view to concluding a collective agreement; and the legal enforceability of any agreement that is subsequently reached. With certain minor exceptions, the Act does not prescribe the contents of collective agreements, nor does it prevent the parties from resorting to economic pressure to resolve a bargaining impasse. The right to strike or lockout is an integral part of the bargaining process, and it is recognized that the terms and conditions of employment will, in large measure, reflect the relative bargaining power of the negotiating parties. Once a collective agreement is in place however, neither party is free to use its economic strength to settle disputes which subsequently arise. The legislature has determined that such disputes must be resolved by a process of third party adjudication and the parties are no longer free to rely upon their bargaining power to secure a favourable settlement. Similarly, section 81 involves a legislative determination that disputes respecting work jurisdiction should not be the basis for economic conflict, although they can, of course, be settled through joint negotiation. Section 81 of the Act sets out a detailed procedure for resolving work jurisdiction complaints and gives broad powers to the Board to direct what action, if any, the employer, the employers' organization, the trade union or any council of trade unions or any officer, agent or official of any of them or any person shall do or refrain from doing with respect to the assignment of work. These work jurisdiction provisions supplement the general dispute resolution mechanisms contained in the parties' collective agreement. The powers given to the Board under Section 81 extend to the alteration of bargaining units determined in a certificate or defined in a collective agreement. In addition, the Board is given broad powers to respond on an interim basis where a complaint is made under the section and the complaint alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work. Section 81(8) is not limited by reference to either legal or illegal strikes and hence the Board's interim authority under the section applies in respect of any strike which is imminent because of a dispute between unions as to work assignment. It is apparent that section 81 is inserted to provide a means of resolving jurisdiction disputes outside the "self help" means of a strike.

22. In view of the express provisions in section 81, respecting the resolution of jurisdictional disputes, are the parties free to resort to economic conflict to settle these matters, and can a party be bargaining in good faith if it presses the issue to an impasse and precipitates a strike? The answer must be no. It is inconceivable that the Act would contemplate resort to strike or lockout in support of a work assignment objective which could properly be made the subject matter of a section 81 complaint upon the actual assignment of the work. If such were the case the strike/lockout would be tenuous and perhaps fruitless exercise in that the Board, on any subsequent application under the section, would be required

to assess the merits and could decide the matter independently of the results achieved by use of what might have been a prolonged and costly economic struggle. The work assignment agreement thus achieved, in contrast to the other terms of settlement, would be subject to review and possible alteration by the Board. Under the section the Board may make its determination notwithstanding the work assignment provisions of any collective agreement and, in appropriate circumstances, can even "rewrite" those provisions. In a general sense then it can be seen that bargaining issues relating to work jurisdiction which could be made the subject of a section 81 application do not easily fit within the process of free collective bargaining and enforceability as established under the Act. More specifically, the broad interim powers given the Board under section 81(8) to deal with work jurisdiction complaints where a strike is imminent underscores the qualitative difference between work jurisdiction and the usual subject matters giving rise to strike or lockout. If a strike is imminent because of a bargaining demand for a work assignment involving work being done by another union it can be met with a section 81(8) complaint and in response the Board may issue an interim order which removes the work jurisdiction issue from the realm of bipartite economic struggle and paves the way for a hearing on the merits involving all interested parties. On its face then section 81 qualifies the union's right to strike and prevents the development of a situation in which the assignment of work will be determined by the relative economic strength of either of the competing unions or the employer.

23. In *United Brotherhood of Carpenters and Joiners, supra*, the Board found that while the parties could discuss the issue of recognition at the bargaining table it could not become the subject matter of a strike. The Act provides a means for the acquisition of bargaining rights and it is inconsistent with the scheme of the Act to take a demand for "voluntary" recognition to an impasse. Accordingly, the party pressing the demand to an impasse was held to have breached the duty to bargain in good faith. Similarly, the Board is of the view, having regard to the scope of section 81(1) of the Act, that it would not be consistent with the overall scheme of the Act to take a demand for work assignments which could form the subject matter of a section 81 complaint (either at the time or upon the actual assignment of work) to a bargaining impasse. The Act provides a comprehensive vehicle for resolving these multi-party disputes and hence the issue cannot form the proper subject matter of a strike or lockout within the context of bipartite negotiations. If taken to a bargaining impasse as in this case, therefore, the issue must be withdrawn from the bargaining table without prejudice to a subsequent hearing under section 81 of the Act. The parties are encouraged to seek voluntary agreement in respect of competing work jurisdiction, as the parties to the instant application have done in the past, but any attempt to use economic sanctions or the immediate threat of same to force a settlement or to compromise the position of another in respect of a work assignment dispute which may become the subject matter of a section 81 complaint is contrary to the scheme of the Act and is, therefore, in violation of section 14 of the Act. It could be argued that both parties to the negotiations are in breach of the duty to bargain in good faith when work jurisdiction becomes the subject matter of a bargaining impasse. The Board is of the view, however, that it must look to the status quo in assessing the bargaining conduct which has led to the impasse.

24. In this case it is the Star which is attempting to force acceptance of an arrangement other than the status quo as embodied in the previous collective agreement and in so doing is requiring the photoengravers to possibly prejudice their position in any subsequent section 81 proceedings. Indeed, the Star maintains in its representations that if an agreement is achieved through the use of free collective bargaining a potential jurisdictional dis-

pute will be effectively disposed of. In its earlier decision the Board stated that neither the Star nor Local 1 (stereotypers) could use the negotiation process to weaken the photoengravers' claim to the work in question. The Star, however, has ignored the caution contained in the Board's earlier decision and has misused the bargaining process by pursuing its demand to a bargaining impasse. The photoengravers have refused to voluntarily alter the existing agreement and accordingly, the Board hereby finds, in the face of a bargaining impasse, that the refusal of the Star to withdraw its demand without prejudice to whatever position it might take in any subsequent section 81 complaint, constitutes a violation of the duty contained in section 14 of the Act.

25. The Board, therefore, declares that the respondent, Toronto Star Newspapers Limited, by pursuing its work assignment demands to a bargaining impasse has acted in a manner inconsistent with the scheme of the Act and has thereby failed to meet the obligation contained in section 14 of the Act.

26. Without passing comment on the merits of the stereotypers' claim to the work in question, we are satisfied that the stereotypers did not violate the Act in seeking and achieving tentative agreement with the Star in respect of its claim to this work. The Board does not view the prior agreements as necessarily settling the competing claims for all time as is suggested by the photoengravers. The Board has found that the issue before it is not one which can be primarily characterized as recognition and accordingly, the Board hereby dismisses the complaint against the Printing and Graphic Communications Union No. N-1. The agreement between the Star and the stereotypers in respect of this work does not compromise the photoengravers' claim to the work under section 81 within the meaning of paragraph 16 of the Board's earlier decision. The tentative agreement stands and if ratified a collective agreement will exist with work jurisdiction which overlaps with that found in the photoengravers' agreement. Section 81 of the Act is designed to deal with such conflicting work jurisdictions and the Board has broad powers to direct what action shall be taken including the power to alter bargaining unit descriptions.

#### **DECISION OF BOARD MEMBER C. G. BOURNE:**

The decision of Mr. Bourne will follow.

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**0621-79-R** Trent Metals Employees Association, (Applicant), v. **Trent Metals Limited**, (Respondent) v. United Electrical, Radio and Machine Workers of America (UE), (Intervener).

**Certification – Collective Agreement – Timeliness – Trade Union Status – Applicant entering into recognition agreement during organizing drive by intervenor – No ban to intervening certification application – Applicant receiving employer support**

**BEFORE:** Keven M. Burkett, Vice-Chairman, and Board Members C. A. Ballentine and R. Redford.

**DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER R. REDFORD**, August 31, 1979

1. The name "Trent Metals Ltd." appearing in the style of cause of this application as the name of the respondent is amended to read "Trend Metals Limited".
2. This is an application for certification. There is also filed with the Board an application for certification by the intervenor prior to the terminal date of the initial application.
3. The registrar in a letter dated July 6th, 1979 advised the applicant organization that it must be prepared at the hearing to satisfy the Board that it is a trade union within the meaning of the Act. The Board heard evidence from Mr. Bruce Dewar concerning the trade union status of the applicant organization. The evidence establishes that on June 20, 1979 Mr. Dewar convened a meeting of 35-40 bargaining unit employees immediately after work. The meeting was held in a warehouse used by the company which is adjacent to the company's production facilities. Copies of a proposed constitution were circulated. A majority of those present signed Certificates of Membership which read:

**"CERTIFICATE OF MEMBERSHIP TO TRENT METAL EMPLOYEES ASSOCIATION (TMEA)**

I after reading and agreeing in principle with the drafted constitution of T.M.E.A. will become a member of T.M.E.A. and will abide by the constitution.

I have paid at least one dollar (\$1.00) initiation fee or monthly dues and will acknowledge this form as a legal receipt.

I am aware that one form will become my personal property and the other form will be retained by the applicant as evidence to be presented to the Ontario Labour Relations Board.

Signed by

**COUNTERSIGNED & WITNESSED BY**

This day of 1979."

A subsequent meeting was held after work on June 25, 1979 at the same warehouse. A majority of those present ratified the constitution and agreed to a formula for the election of officers. Nominations were held and officers elected pursuant to the provisions of the constitution on June 26, 1979. The purpose of the applicant organization as set out in its constitution is to enter into a collective contractual labour agreement for its members with Trent Metals Limited and in summary, to otherwise represent its members in their employment relations with Trent Metals. The applicant organization has a bank account and duly elected officers. Having regard to all of the foregoing the Board is satisfied that the applicant organization is a trade union within the meaning of the Act.

4. The evidence also establishes that on June 28, 1979, the Trent Metals Employees Association and the respondent employer entered into what purports to be a recognition agreement. The agreement is set-out below:

“T.M.E.A. (Trent Metals Employees Association)  
and

Trent Metals Ltd. – Employer

T.M.E.A. having submitted to Trent Metals Ltd.

- A) A copy of T.M.E.A. Constitution
- B) A note declaring that more than sixty per cent of eligible Employees have signed membership cards and paid dues in accordance with requirements of the Ontario Labour Relations Board.
- C) That by secret ballot the Members of T.M.E.A. have elected the undersigned as their executive.

Therefore, the Employer (Trent Metals Ltd.) hereby agrees to recognize the Association (T.M.E.A.) as sole bargaining agent for All Employees, and, that both parties agree to enter into formal discussions to formulate a collective Agreement in accordance with guidelines of the Ontario Labour Relations Act.

Signed on behalf of

T.M.E.A.

Trent Metals Ltd.

(Trent Metals Employees  
Association)

(Sgd.) Gary Cummings  
President

(Sgd.) Brian A. Clark  
President

(Sgd.) Stephen Merrin  
Vice-President

(Sgd.) Alexander Clark  
Vice-President

(Sgd.) Terry Beach  
Treasurer

(Sgd.) Lynda Edwards  
Secretary  
9:50 A.M.”

Signed at Peterborough  
this 28th day of June 1979 at

Immediately following the signing of this agreement the applicant and representatives of the respondent commenced to negotiate certain terms and conditions of employment. A “wage rate settlement” was concluded which was communicated to the employees by memorandum dated July 11, 1979.

5. The intervener trade union commenced its organizing drive in respect of the respondent’s employees on or about June 20, 1979. It signed seven employees into membership on or about June 20, 1979. It signed seven employees into membership on June 21, 1979 and a further fourteen employees were signed into membership on June 22, 1979. In total the intervener union signed twenty-five of the respondent’s employees into membership between June 21, 1979 and June 28, 1979; the day the employer entered into the purported recognition agreement with the applicant. The intervener trade union has submitted only two membership cards signed in the period June 28 to July 13, 1979, the terminal date in respect of this application. The intervener filed its application in respect of the respondent’s employees on July 13, 1979 the terminal date of the initial application.

6. The Board must decide what effect, if any, it is prepared to give the purported recognition agreement and the “wage rate settlement” negotiated between the applicant and respondent. If the recognition agreement is allowed to stand and with it the “wage rate” agreement with the applicant and respondent then the application of the intervener must be found to be untimely. Where an employer and a trade union which has not been certified as the bargaining agent for the respondent’s employees enter into a collective agreement, or a recognition agreement the Board, upon the application of an employee in the bargaining unit or any trade union that represents an employee in the bargaining unit, made within one year of the signing of the collective agreement or recognition agreement, is given a broad discretion under section 52 of the Act, to declare that the trade union was not entitled to represent the employees in the bargaining unit. Under the provisions of section 52(4) the trade union ceases to represent the employees in the defined bargaining unit in either the recognition agreement or the collective agreement and “any collective agreement in operation between the trade union and the employer ceases to operate ...” upon the Board making a declaration under subsection 1 of section 52. Section 52(1) the Act provides:

“Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement or a recognition agreement as provided for in subsection 3 of section 15, the Board may, upon the application of any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.”

The Board is satisfied that the intervener’s application for certification in this matter is also an application under section 52. Implicit in the intervener’s application is the request that



the Board strike down the recognition agreement which, if upheld, would serve as a bar to its certification.

7. The recognition agreement between the applicant and the respondent employer was entered into at a time when the intervener trade union was in the process of signing employees of the respondent into membership. Indeed the intervener had signed more than one third of the respondent's employees into membership at the time the recognition agreement was entered into therefore, there was a legitimate contest between the two unions at the time as to which one would become the bargaining agent for the respondent's employees. Having regard to this fact the Board hereby declares, pursuant to its authority under section 52 of the Act, that the applicant was not entitled to represent the respondent's employees at the time the recognition agreement was entered into. Accordingly, that agreement and the "wage settlement", whatever it may have been, cease to operate and cannot bar the intervener's application. The Board must consider both applications.

8. Section 12 of the Act provides:

"The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin."

The Board is proscribed by statute from certifying a trade union if any employer has contributed financial or other support to it. The Board can think of no more meaningful support in the context of a bi-union contest of membership, as in this case, than the extension of recognition to one of the two unions. The effect of such recognition is to indicate the employer's desire to deal with that union to the exclusion of the other and to thereby chill, if not destroy, the organizing campaign of the unrecognized trade union. Indeed in this case the intervener union submitted only two membership cards which were signed after the applicant and the respondent company entered into their recognition agreement. In the circumstances the Board must find that the applicant has been the recipient of employer support within the meaning of section 12 of the Act and dismiss its application.

9. Turning to the intervener's application. By agreement of the parties, the Board finds that all hourly rated employees engaged in manufacturing, shipping, and truck drivers (excluding sales, office and supervisory staff) employed by Trent Metals Limited, in the City of Peterborough, Ontario, who serve the needs of industry in Central and Eastern Ontario, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 13, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. The intervener's application is therefore dismissed.

**DECISION OF BOARD MEMBER C.A. BALLENTINE:**

1. The majority of the Board considered the formation and organization of the applicant and found that it had properly constituted itself as an employee's organization. While I agree that the applicant had taken the necessary legal steps to form a "trade union", the employer's participation in the formation of the applicant does not now permit it to be given status as a trade union. The use of the company's facilities immediately after working hours for meetings called by the applicant must lead to the inference that the employer knew what the premises were being used for, and that the employer approved of and supported the formation of the applicant as a trade union. In my opinion, that is sufficient to disqualify the applicant from being recognized as a trade union by the Board.

2. A finding that the applicant is not a trade union would have been sufficient to dispose of the recognition agreement bar raised by the parties to the intervener's request for certification. However, the majority of the Board have determined that at the time the applicant and the respondent entered into the recognition agreement, the applicant was not entitled to represent the respondent's employees. I agree with the majority of the Board in that determination. I also agree with the Board's declaration pursuant to section 52 of the Act which terminates the effect, if any, that the recognition agreement and wage settlement have with respect to the respondent's employees.

3. The Board has found that the applicant has received employer support within the meaning of section 12 of the Act, thus the applicant is prohibited from being certified by the Board. The Board has found that the effect of the employer giving its support to the applicant was to "... chill, if not destroy, the organizing campaign of the unrecognized trade union. Indeed in this case the intervener union submitted only two membership cards which were signed after the applicant and the respondent company entered into their recognition agreement".

4. The employer, by the giving of "other support" to the applicant and by interfering in the formation and selection of a trade union by employees contrary to section 56 of the Act stopped the organizing campaign of the intervener and made any further attempts at organizing fruitless. Under the circumstances, I am of the opinion that the Board may entertain an application by the intervener for certification under section 7a of the Act to remedy the chilling effect of employer's violations of the Act. There was sufficient evidence before the Board to find that intervener had membership support adequate for purposes of collective bargaining and that the actions of the employer in this case contravened the Act to the extent that the true wishes of the employees are not likely to be ascertained by a representation vote.

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**2007-78-R** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819, (Applicant), v. **The Tower Company (1961) Ltd.** and Burjan Construction Company Ltd. Joint Venture, (Respondent).

**Natural Justice – Board reaching decisions based only on evidence before it and relevant jurisprudence**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and C.A. Ballentine

**DECISION OF THE BOARD;** August 24, 1979

1. This is an application for certification in which the Board issued a decision on June 6, 1979, [1979] OLRB Rep. June 583. The respondent has written to the Board requesting that it reconsider this decision.

2. At the hearing it was the position of the respondent that the Board lacked jurisdiction to entertain the application and also that the respondent was not the employer of the employees affected by the application. In support of this position counsel for the respondent led certain evidence before the Board and made certain submissions concerning the conclusions she would have the Board draw from this evidence. The applicant was represented by a layman whose brief submissions did not really deal with the legal issues raised by counsel for the respondent. Notwithstanding this fact, the Board determined that the evidence before it did not support the position being argued for by counsel for the respondent. Instead, on the basis of the evidence, the Board concluded that it did have jurisdiction to entertain the application and also that the respondent was the employer of the employees. With respect to these developments the respondent in its request for reconsideration made the following submissions:

“It is respectfully submitted that in the particular case before the Board an injustice was done to the Respondent as a result of the Board having assumed the role of the Applicant and in camera, constructed arguments not raised by the Applicant at the time of the hearing. In so doing the Board has denied the Respondent the right to point out inconsistencies, contradictions and to submit further arguments in reply. This is not a case where the Applicant can plead surprise since the Applicant was fully apprised prior to the hearing of the arguments which were to be made before the Board. Surely there must be some onus on the Applicant to make representations before he can succeed in having the Board conclude in his favour.”

3. There was never any question but that the applicant regarded the respondent as the employer of the employees and that it viewed the Board as having jurisdiction to entertain the application. Indeed, these points are clear from the face of the application itself. The respondent's objection to the Board's decision arises from the fact that although the respondent's position was supported at the hearing by a well-presented legal argument and the applicant's was not, the Board nevertheless adopted the applicant's position. The Board



in its deliberations did not, however, assume the role of the applicant. Rather it concluded that the evidence before it did not support the position being contended for by the respondent. While a well-presented submission as to the conclusions the Board should draw from the evidence may well affect the outcome of a case, a well presented submission by itself cannot guarantee success, even when the other party's presentation is not of the same high caliber. In the final result the Board must reach its conclusions on the basis of the evidence before it. This being so, we are not satisfied that the fact that the Board reached the conclusions it did resulted in an injustice to the respondent such as to cause the Board to reconsider its decision.

• • •

5. Having regard to the above, the Board declines to reconsider its decision of June 6, 1979.

6. The applicant and the respondent have now reached agreement as to the description of the bargaining unit and the list of employees. Having regard to this agreement the Board finds that all employees of the respondent in the City of Cornwall save and except foremen, persons above the rank of foreman, persons who regularly work not more than twenty-four (24) hours per week, office and sales staff and local contact men, constitute a unit of employees of the respondent appropriate for collective bargaining.

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8. A certificate will issue to the applicant.

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**1731-78-R** Canadian Food and Allied Workers Local Unions 175 and 633 (Amalgamated Meat Cutters and Butcher Workmen of North America, affiliated with the AFL-CIO-CLC), (Applicant), v. **Valdi Inc.**, (Respondent).

**Bargaining Rights – Related Employer – Collective agreement defining bargaining rights by business type – Similar business opened by related employer – Board determining new business not within scope of collective agreement – Board declining to issue declaration**

**BEFORE:** Arthur L. Haladner, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

**APPEARANCES:** *D. J. Wray and Dan Doyle for the applicant; C. M. McKeown, Q.C. and B. Adams for the respondent.*

**DECISION OF THE BOARD;** August 14, 1979

1. The name "Steinberg's Inc. and Valdi Discount Foods" appearing in the style of cause of this application as the name of the respondent is amended to read: "Valdi Inc."

2. This is an application made pursuant to section 1(4) of *The Labour Relations Act*. The applicant, Canadian Food and Allied Workers Local Unions 175 and 633, is seeking a declaration that the respondent Valdi Discount Foods (Valdi) is bound by the collective agreement currently in existence between itself and the respondent Steinberg's Inc. (Steinberg's). In that agreement, which is effective from June 22, 1978 to June 21, 1980, the applicant is recognized as the exclusive bargaining agent for all employees of Steinberg's in its retail food supermarkets in the Province of Ontario exclusive of certain counties.

3. Before outlining the salient facts relating to the operation of Valdi, and its relationship to Steinberg's and Miracle Food Mart (which, prior to Valdi's introduction – in October 1978 – represented Steinberg's only retail food outlets), we should indicate the genesis of the bargaining rights which the applicant now holds. To determine the scope of these rights is the major task confronting the Board in this case.

4. Commencing in 1961, after the applicant was certified for the meat department employees of Steinberg's in its stores in London, the parties have negotiated a series of collective agreements. In 1962 – after the applicant was successful in obtaining certificates for twenty other stores – moving from London to Toronto – Steinberg's decided voluntarily to grant to the applicant recognition for all employees in its "retail stores" (Ontario Division). As a result of this grant of voluntary recognition the unorganized supermarkets then in existence, and administered by Steinberg's Ontario Division, came under the Collective Agreement as did the Ontario Division supermarkets which were subsequently opened.

5. In 1972 the wording of the recognition clause was narrowed; the grant of recognition was confined to all employees of Steinberg's in its retail food supermarkets, in the Province of Ontario, exclusive of certain counties, and the language has continued in that form to this day. The uncontradicted evidence of the respondent establishes that the change from retail stores to retail food supermarkets came about as a result of a proposal by Steinberg's to that effect and that the change in the geographic description – from Ontario Division to the Province of Ontario – was instituted at the request of the applicant. Mrs. Joy Reese, the manager of personnel services for Miracle Food Mart, and a participant in the 1972 negotiations, gave evidence that the applicant accepted its proposal to narrow the definition of the enterprise because it more accurately reflected the business it was then operating. She allowed, however, that in 1972 there was no discussion between the parties as to the meaning of the term "retail food supermarket", nor discussions about any food stores other than the Miracle Food Marts, as Steinberg's Ontario Division supermarkets were by this time known. Prior to 1970 Steinberg's supermarkets in Ontario were known as Steinberg's as they were, and are still known in Quebec, and in Ottawa and Cornwall, where the supermarkets are part of Steinberg's Quebec Division.

6. In 1972 the respondent had other operations fitting the description retail stores – namely, a catalogue store selling small appliances and furniture. However, it did not at that time have any other retail food stores.

7. The description "retail food supermarket" is, the Board was informed, unique in the industry; other collective agreements, including those between the applicant and Loblaws and A & P recognize the union as the exclusive bargaining agent for employees in the employer's "retail stores".

8. In addition to its retail food outlets – Miracle Food Mart and now Valdi – Steinberg’s currently owns department stores (“Miracle Marts”), restaurants, a flour and a sugar mill, a bakery, and a delicatessen, and a corporate real estate firm. Valdi, which commenced operations in October of 1978 – it was incorporated in August – now has four stores in operation – one at Dundas Street East, Mississauga, one at Eglinton Avenue East, North York, one at Birchmount Road, Scarborough, and one in Hamilton.

9. Prior to their being occupied by Valdi, none of these locations were used by Miracle Food Mart or any other Steinberg’s operation. One of the stores had previously been utilized by A & P – five years ago – but was at the time of its occupation being used for electioneering purposes; another was an “Ultra Mart”, an operation similar to Valdi, that failed; the other two stores were both occupied in part of the Bad Boy. The Valdi locations, all of which were selected (and the leases negotiated) by Steinberg’s corporate real estate division, are located in small shopping plazas. None of these plazas contain any food chain stores.

10. Valdi stores differ from Miracle Food Marts, and supermarkets in general, in their hours of operation (55 hours for Valdi as opposed to 65 hours [or more] for the chains) and in the service provided (at Valdi the merchandise rests on platforms on the floor – in the original containers – and the customer must bring her (his) own bag). The main difference, however, and the one upon which the respondents place primary emphasis, is in the assortment of merchandise available. At Valdi, which is referred to in the trade as a “limited assortment” store, there is no fresh meat, no produce requiring refrigeration, and no dairy products; its assortment is limited to certain, frequently purchased, dry grocery items and a few non-food items such as cleaning and paper products. By contrast with the average supermarket, which stocks between 7,000 and 12,000 items, Valdi carries only 450 items. The difference in the number of items stocks reflects both the limited product selection (Valdi carries only one-half of the product classes carried in the traditional supermarket) as well as the fact that Valdi carries only one brand and only one size of each.

11. Morris Ladenhein, the person primarily responsible for the establishment of Valdi, and for the initial concept research, gave evidence that the idea for Valdi, which is patterned after similar operations in Chicago and Germany, was introduced following a study of the concept done by Steinberg’s three years ago. The appeal of Valdi, which is currently the only store of its kind in the province, is, Mr. Ladenhein stated, to anyone wishing to save money. Because of the lower costs associated with its “limited assortment”, Valdi is able to offer to the consumer substantial savings on the grocery items it stocks. At Valdi, prices are 25 to 32 per cent below the regular prices in the chains – as determined by an independent market survey. Valdi’s prices, which are the lowest on the market, are achieved, the Board was informed, without sacrifice to the quality of the merchandise. Valdi carries only name brands – a few of its own – registered in the name Valdi – and has a policy whereby it will take back any product with which the customer is not completely satisfied and refund his money, with no questions asked.

12. The Board heard evidence that Valdi stores, which range in size from 6,500 to 11,000 square feet, are significantly smaller than the average 1979 supermarket, which is about 23,000 square feet, and smaller still than the existing Miracle Food Marts, which average approximately 30,000 square feet. The Miracle Food Marts now being built will average in excess of that figure consistent with the trend in the industry toward larger and larger stores.



13. Donald Tigert, an analyst from the brokerage firm of Burns & Fry, specializing in merchandising industry companies, gave evidence that it has become increasingly difficult in recent years to make money out of a supermarket containing less than 20,000 square feet and that, because of this, a number of stores in that category have been forced to close. The respondents do not, however, contend that size alone should be a controlling consideration in this case. In this regard, the applicant was assured by Mr. Ladenhein, who is Vice-President of Steinberg's, that when Steinberg's "super stores" (60,000 square feet and above) become operative – as they will in the near future – they will be considered by the employer as part of the bargaining unit.

14. It is not clear at this point whether Valdi, which is still in the experimental stage, will prove a viable proposition. However, there are at present plans to open several more stores. In response to a question from counsel for the applicant as to whether Valdi might in the future be making changes to its limited assortment, Mr. Ladenhein stated that the company feels confident it has the right concept; the question is whether the public will accept it or not.

15. Valdi, like Miracle Food Mart, is a wholly-owned division of Steinberg's with common directors and officers. Prior to becoming involved with Valdi, Mr. Ladenhein, who is Vice-President of Valdi as well as Steinberg's, was in charge of Steinberg's private labelling program, the program that supplies labels for products sold by Steinberg's through any of its divisions including Miracle Food Mart. Mr. Ladenhein who still does some of that – approximately 80 per cent of his time is occupied with Valdi – is paid by Steinberg's as is Harry Lutgens, Valdi's divisional manager, a former zone manager for Miracle Food Mart. Lutgens' salary is charged back to Valdi. However, Ladenhein's is not.

16. Valdi's in-store personnel consists of a store manager and an assistant manager – at each store – and seven to nine part-time cashiers who assist the managers with the stocking. Of the four store managers, all of whom were hired by Lutgens – through Steinberg's St. Clair office – one was working part-time at Miracle Food Mart, another two used to work there but were working elsewhere when hired, and the other operated a private corner store.

17. The evidence, although disclosing a measure of vertical integration between Steinberg's and Valdi, indicates that Valdi and Miracle Food Mart (the activities which the applicant says are "associated or related") do not, on a functional level, interact. Valdi does all of its own buying, makes its own arrangements for delivery and storage and maintains its own head and business office. Its employees are paid Valdi cheques and are not on the Steinberg's payroll, as are employees of Miracle Food Mart.

18. Valdi suppliers and advertisers are paid by Steinberg's, which bills Valdi. Valdi, which does not as yet have its own accounting office, uses the facilities of Steinberg's, a service for which it is charged. Its legal services are supplied by Steinberg's. Initial payments for the leases, which are in Valdi's name (Valdi is making the ongoing payments which are not guaranteed) were advanced by Steinberg's as were the payments for renovations. These monies are to be repaid to Steinberg's with interest.

19. Valdi is advertised as a Steinberg's corporation – to give the new operation credibility. However, no attempt has been made to identify Valdi with Miracle Food Mart – through the use of a common telephone number, letterhead, signs, colour coding, etc., or to

associate it with Steinberg's own private brands, none of which are available at Valdi. As stated, none of the Valdi stores were sites of Miracle Food Marts.

20. Mr. Ladenhein gave evidence that the introduction of Valdi had no effect upon the long-range growth strategy of Miracle Food Mart. Miracle Food Mart, in contrast to some of the other chains, is opening more stores than it is closing. Each year it has increased the number of stores and selling space in Ontario.

21. Section 1(4) allows the Board to pierce the corporate veil in circumstances where associated or related enterprises are carried on under common control or direction. It states:

“Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

22. In *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914, the Board had this to say about the reach of section 1(4) and its limits:

“A significant principle underlying both section 1(4) and section 55 is that a union should not have its bargaining rights diluted by the decision of an employer to conduct a part or all of its business through a separate non-union corporation (see *Inducon Construction of Canada*, [1975] OLRB Rep. Apr. 400). Such a decision quite often involves the transfer of employees from the union to the non-union corporation – the situation referred to in *Industrial Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029. The employer may decide, however, to hire new employees to perform work which was previously done by its unionized employees. In such circumstances, the principle underlying section 1(4) normally requires that the bargaining rights of the union be applied to the new corporation. The Board does not consider that section 1(4) was intended to be limited to situations involving a transfer of employees, as was argued by counsel for the respondents. It is sufficient that the business of the employer be directed from the unionized corporation to the non-unionized so as to effectively undermine the bargaining rights of the union. (For a recent statement to this effect, see *United Brotherhood of Carpenters and Joiners of America, Local 2468, and Steds Limited and Stedsteel Buildings*, September 8, 1978 Board File No. 0776-78-R.)

The converse to the principle that the bargaining rights of a union should be protected from erosion by employer manipulation of the corporate form is that the appearance of a new corporate entity should not be the occasion for an expansion of bargaining rights into a previously

unrepresented area. That is, without a showing by the applicant that it has the support of a majority of the employees in the new grouping. If the Board were to use section 1(4) or section 55 so as to confer upon a union bargaining rights which it did not previously possess (or which it had long since abandoned) it would be ignoring the fundamental policy stated in the preamble to the Act and reflected in section 3 – that collective bargaining is to be between employers and unions as the freely designated representatives of employees. For that reason, the Board has consistently held that the relief available under section 1(4) and section 55 is not to be sought as a substitute for obtaining bargaining rights through normal certification procedures. (See, most recently, *D. L. Stephens Contracting Niagara and Stephens and Bass Limited*, [1978] OLRB Rep. June and *Bryant Press Ltd.*, [1972] OLRB Rep. Apr. 301)”

23. It is clear, and not disputed, that Valdi and Miracle Food Mart are being operated under common control or direction – namely, the control or direction of Steinberg’s which is the employer party to the collective agreement; and, in the Board’s view, the fact that the two divisions are carrying on business in the retail food industry – selling groceries – is sufficient by itself to allow for a finding that they are associated or related within the meaning of section 1(4). A substantial issue, however, is whether the introduction of Valdi has resulted in a situation where bargaining rights are being eroded or whether this is a case in which the union is seeking to expand its rights into a new area.

24. Counsel for the applicant, while recognizing the existence of certain differences in the Valdi operation from that of Miracle Food Mart – in terms of size, assortment, service and price – argues that these differences do not alter the essential character of the business, which is selling food to consumers. Counsel points to the changes in the retail food industry generally which has seen, in recent years, a proliferation of new types of stores, e.g., the “convenience”, “discount”, “warehouse”, and “specialty”, each with their own appeal to the consumer. Counsel submits that bargaining rights should not be lost because of new marketing strategies and pricing policies. Steinberg’s, counsel contends, because it did not wish to lose the discount food market which has traditionally shopped at the chains, set up its own discount operation in order to attract customers which its competitors such as Loblaw’s and Dominion were trying to lure with their own innovations. Counsel relies on *Dominion Stores Limited and Min-A-Mart Limited*, [1978] OLRB Rep. Nov. 1013, where the Board held that two new operations opened by Dominion – one a “convenience” and the other a “discount” store were associated or related within the meaning of section 1(4). In the former case, the Board declined, on the ground of delay, to exercise its discretionary power; however, in the latter case a declaration was issued.

25. In *Dominion Stores*, the Board stated that the first question to be decided was whether the employees of Min-A-Mart were persons who could be encompassed by the scope of the collective agreement between the applicant – in that case, Retail Wholesale and Department Store Union, Local 414 – and Dominion Stores, save for the interposition of Min-A-Mart Limited. By contrast to the situation in *Dominion Stores*, where the collective agreement recognized the applicant “for and on behalf of all employees of Dominion Stores Limited in its retail stores in the Municipality of Metropolitan Toronto ...”, and provided further that “should the Company open stores within the townships set out in the attached schedule the Company will recognize the Union as the bargaining agent and such stores will



be covered by this agreement”, it is not obvious that had all the circumstances of this case remained the same except that the stores in question had been opened by Miracle Food Mart, instead of Valdi, the employees would have fallen within the scope of the collective agreement. Not only is the language of the recognition clause much narrower in scope – being restricted to “retail food supermarkets”, the evidence establishes that the restriction, which is unique in the industry, came about as a result of a proposal put forward by management to narrow the definition of the business and that in return (or at least at the same time) the union was successful in getting away from an administrative definition, thereby removing from the employer any discretion it might have with respect to what constituted its Ontario Division. Whatever was in the minds of the parties at the time these changes were agreed upon, clearly their intention was to confine the application of the agreement to retail food supermarkets and not just to retail food stores – otherwise the word “supermarket” would have been superfluous.

26. The issue then boils down to this: can Valdi be properly characterized as a “retail food supermarket” within the meaning of the recognition clause? If it can, then this case is one in which bargaining rights should be protected by the Board granting to the applicant section 1(4) relief. If, on the other hand, it cannot, then relief under section 1(4) should be refused, and the applicant should be required to proceed by way of the normal certification procedures.

27. There can be no doubt on the evidence that the business engaged in by Valdi differs in at least one important respect from the traditional supermarket. The evidence is that Valdi, which is smaller than the average supermarket now existing, and substantially smaller than the newer ones, carries no fresh meat or produce, no dairy products, and very little in the way of non-food items; its assortment is limited essentially to dry groceries, i.e., groceries not requiring refrigeration. There are also differences with respect to the selection within the class and the amount of service provided. However, we do not view these differences as particularly significant. In the Board’s view, what distinguishes Valdi from Miracle Food Mart and from other “supermarkets” is that a shopper there can neither complete, nor come close to completing her (his) shopping for the week as can be done, for example, at the other discount stores. Mr. Tigert testified that these other stores carry most of the items found in a traditional supermarket – 70 to 80 per cent. The same is true of most convenience stores, where the customer pays more for the privilege of checking out fast. Because Valdi is substantially lacking in three of the four departments normally found in a “supermarket” (a supermarket is defined in the trade as a large departmentalized retail establishment offering a relatively broad and complete stock of dry groceries, fresh meat, perishable produce and dairy products, supplanted by a variety of convenience non-food merchandise and operated primarily on a self-service basis – *Marketing*, Theodore Beckman and William Davidson, 1962, The Ronald Press) its customers are required to go elsewhere for their meat, produce and dairy products.

28. But counsel for the applicant points out that a shopper can get a good deal of her (his) shopping done at Valdi and that she/he cannot normally obtain all the merchandise required at a convenience or other discount store. The Board agrees that the absence of one of the basic food groups should not automatically disentitle a food store to “supermarket” status. However, there comes a point beyond which this must be taken to result and, without expressing any opinion as to the status of the other discount food stores, the Board has come to the conclusion that that point has been reached in this case. In our judgment, the

operation of Valdi is such that it should not, at least for purposes of the collective agreement between Steinberg's and the applicant, be characterized as a "retail food supermarket".

29. In so finding, the Board has been influenced by the bargaining which has taken place between the parties. As noted at the outset, the evidence is that Steinberg's, after agreeing to recognize the applicant for what was essentially a province-wide bargaining unit, bargained away from the broader form of recognition existing elsewhere in the industry to one which is peculiar to the particular bargaining relationship at hand. The existence of this bargaining argues against counsel's contention that the recognition clause of the collective agreement is broad enough to include within its scope the operation that is Valdi's.

30. Had there been evidence that the emergence of Valdi has or is likely to result in a situation where business is being diverted from Miracle Food Mart to the new corporation, the Board might have taken a different view of this case. In that event, it could have been regarded as a situation where bargaining rights were being eroded thus warranting, if possible, a more expansive interpretation of the term "retail food supermarket". The evidence, however, does not indicate that this has occurred. The evidence is that Valdi, which has not hired any Miracle Food Mart employees, has maintained an image separate and apart from Miracle Food Mart and that, aside from their presence together in the Steinberg's corporate establishment, there has been no attempt made to link the two activities in the mind of the consumer. It is true that, in the broadest sense, both businesses are aimed at the same market, i.e., everyone who eats. However, the possibility that a former Miracle Food Mart shopper will be persuaded to switch from another discount store to Valdi for her (his) dry groceries is not, in our view, a sufficient reason for holding that the business of Miracle Food Mart has, or will be, diverted, and in such a way as to undermine the bargaining rights which the applicant now holds. As stated, the evidence is that the Miracle Food Mart Division, which is not functionally related to that of Valdi, is expanding all the time and that the emergence of Valdi has had no effect upon its strategy of growth. In our opinion, Valdi should be regarded as an adjunct to Steinberg's total business rather than a receptacle for business which has been lost – as was the situation in *Farquhar* and *Steds Limited*, *supra*.

31. It should be stated here that the Board attaches no significance to the fact that leases at Valdi locations contain covenants restricting, for example, the landlord from renting to another food store other than a "convenience, delicatessen, bakery, food and vegetable or butcher store". Peter Lebedewsky, who sought the leasehold space for Valdi – on Steinberg's instructions – gave evidence that the intent of the restriction was to keep out operations similar to Valdi and not "supermarkets", which never occupy plazas of this size. Mr. Lebedewsky testified further that Steinberg's does not care whether Valdi comes into an area where Miracle Food Mart has a store. Nor is this surprising; for if customers are drawn to Valdi by its low prices, then the chances of their doing or continuing to do the remaining portion of their shopping at Miracle Food Mart is increased.

32. The Board characterizes this case as one in which there has been an attempt made to expand bargaining rights into a previously unrepresented area. It follows that the applicant, which has not as yet demonstrated that it has the support of a majority of the Valdi employees, should be required to proceed by way of the normal certification procedures. Accordingly, the Board declines to exercise its discretion to treat the respondents as constituting one employer, and the application is dismissed.

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**1778-78-R** Oil Chemical and Atomic Workers International Union, Applicant, v. **Wyeth Ltd.**, Respondent, v. Oil, Chemical & Atomic Workers Int'l. Union Local 9-368, Intervener.

**Certification – Representation Vote – Employer letter mailed on Thursday – Silent period commencing midnight Sunday – Employer adducing evidence establishing mail ordinarily delivered next day – No evidence of letter being received after onset of silent period – No violation of silent period**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members W. F. Rutherford and F. W. Murray.

**APPEARANCES:** *L. A. MacLean, C. S. Sullivan and Larry Gauthier for the applicant; Charles F. Clark and Keith Long for the respondent; no one for the intervener.*

**DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER F. W. MURRAY;** August 23, 1979

1. This is an application for certification of all office and clerical employees of the respondent at Windsor, Ontario. A pre-hearing representation vote was conducted among the employees on March 15, 1979. The majority of the ballots cast were marked against the applicant. The union nevertheless asks the Board to grant certification under section 7a of *The Labour Relations Act* on the grounds that prior to the vote the company engaged in undue influence and material misrepresentation amounting to breaches of sections 56, 58 and 61 of *The Labour Relations Act*. The applicant submits that the employer's actions had the effect of preventing the free expression of the employees' wishes and that, accordingly, the Board should now certify the union notwithstanding the result of the vote. Alternatively, the applicant submits that in its campaign prior to the vote the respondent breached the 72-hour silent period imposed upon the parties by order of the Board immediately prior to the balloting. On that basis it submits that if its request for the application of section 7a is denied, a new vote should be ordered.

2. An employer faced with an application for certification of a group of his employees has the freedom to express his views upon the subject of union representation and collective bargaining so long as he does not use coercion, intimidation, threats, promises or undue influence in an effort to prevent his employees or their union from exercising their rights under *The Labour Relations Act*.

3. Considerable evidence was adduced respecting the respondent's campaign to influence its employees in the representation vote. Having regard to the totality of the evidence the Board is satisfied that there was nothing contained in any of the speeches, letters or posted notices of the employer amounting to coercion, intimidation, threats, promises or undue influence aimed in the respondent's statements to the employees which, taken alone or collectively, amounts to a contravention of *The Labour Relations Act*. The applicant's request for the application of section 7a in the circumstances of this case is, therefore, dismissed.

4. The only outstanding issue is whether there was a breach of the silent period by



the respondent. Prior to the taking of the representation vote, pursuant to his authority under section 43(j) of the Board's Rules of Procedure, the Registrar directed the parties to refrain and desist from propaganda and electioneering during the day in which the vote was held. The silent period commenced at midnight, on Sunday, March 11, 1979. A pre-election propaganda letter was sent by the employer by mail on Thursday, March 8, 1979. The evidence establishes that mail is not delivered in Windsor on Saturday and the applicant submits that since any letter not received by an employee on Friday, March 9, must have been received after the onset of the silent period that the Board should find that the respondent has failed to observe the silent period.

5. With respect to this issue the onus is upon the applicant to satisfy the Board that a breach of the silent period has in fact taken place (*Carling Brewers Ltd.* [1961] OLRB Rep. March 442). In fact no evidence was adduced to establish that any employee received the letter after the onset of the silent period. The evidence of the respondent is that in the normal course ordinary prepaid mail posted in Windsor will be delivered within Windsor on the next business day. That evidence was not rebutted by any evidence adduced by the union and the Board cannot, in these circumstances, infer that a breach of the silent period has occurred.

6. The evidence before the Board does not disclose any breach of *The Labour Relations Act* or irregularity prior to the taking of the representation vote that would cause the Board to order the taking of a further vote. Upon the taking of the representation vote, not more than 50 per cent of the ballots cast were marked in favour of the applicant. The application is, therefore, dismissed.

7. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

8. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of the thirty-day period.

#### **DECISION OF BOARD MEMBER W. F. RUTHERFORD:**

1. I agree with the majority of the Board in holding that an employer, when faced with an application by a union for certification, has the right to express its views to its employees in relation to union representation.

2. However, I must disassociate myself with the finding by the majority that the employer's conduct in this case did not unduly influence the employees. Here the employer went beyond the bounds of reasonable explanations and initiated an anti-union campaign designed to unduly influence and coerce the employees to vote against the union.

3. The evidence disclosed that two secretaries in the Personnel Department and a senior secretary to the Comptroller were active in the employer's anti-union campaign, and were providing the personnel director with information about the union's activity in the company's offices.

4. The personnel manager held meetings on company premises during working hours during which he campaigned against the union. All employees were instructed by supervision to attend these meetings which lasted approximately 45 minutes. The employees were paid by the company for attending these meetings. Under the circumstances, there can be no doubt that attendance at the meetings was compulsory.

5. The board received evidence at the hearing about only one union pamphlet which was distributed during the union's organizing campaign. However, the company in their anti-union campaign mailed 6 letters to the employees. The last mailing took place immediately prior to the onset of the silent period, thus preventing the union from effectively replying to that letter. Also, the company posted daily different notices on its bulletin boards urging employees not to support the union.

6. The respondent's entire campaign directed toward a captive audience of employees exceeded the employer's right to express opinions on the merits of union organization. In my view the employer placed undue pressure on the employees to vote against the union.

7. For these reasons I would have found that the action of the employer in this case amounted to a contravention of *The Labour Relations Act* to the extent that the true wishes of the employees are not likely to be ascertained from the representation vote. The membership evidence of the union was, in my opinion, sufficient for the purposes of collective bargaining and I therefore would have certified the applicant union pursuant to section 7a of *The Labour Relations Act*.









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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1979

### BARGAINING AGENTS CERTIFIED DURING JULY

#### No Vote Conducted

**1314-77-R:** Spar Professional and Allied Technical Employees' Association (Applicant) v. Spar Aerospace Products Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the Municipality of Metropolitan Toronto as professional engineers, engineers, engineers-in-training, scientists and allied technical employees, save and except employees reporting directly to vice-presidents; supervisors, managers and assistant program managers, and those above the rank of supervisor, manager, and assistant program manager, persons covered by the collective agreement between U.A.W. Local 673 and Local 112 and the respondent, persons employed in the personnel and employee relations, finance, marketing and contracts, pricing and program analysis department, persons regularly employed for not more than twenty-four hours per week, and students employed during the school or university vacation period or on work term assignment." (200 employees in the unit). (*For the foregoing reasons*).

**1463-78-R:** Laurentian University Faculty Association (Applicant) v. Laurentian University of Sudbury (Respondent) v. Group of Employees (Objectors).

Unit: "all full-time members of faculty including full-time professional librarians employed by Laurentian University of Sudbury at Sudbury, Ontario, to whom at least fifty per cent of the salary at the University is paid by the University, save and except President, Vice-President Academic, Special Assistant to the President, Deans, Director of the School of Graduate Studies, Directeur du Conseil de l'enseignement en français, Chief Librarian, part-time members of faculty, technicians, faculty members employed by Laurentian University for a period of not more than one year while on leave from another university or other employer and members of the Board of Governors." (274 employees in the unit). (*Having regard to the foregoing*). (*clarity note*).

**2040-78-R:** Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Tip Top Tailors (Respondent) v. Group of Employees (Objectors).

Unit: "all tailors employed by the respondent at its central tailoring shop in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff." (17 employees in the unit).

**0083-79-R:** Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. Cavalier Beverages Ltd. (Respondent).

Unit: "all office and clerical employees of the respondent at Peterborough, save and except the office manager, those above the rank of office manager, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employees in the unit). (*Having regard to the foregoing*).

**0092-79-R:** Canadian Union of Operating Engineers & General Workers (Applicant) v. The Regional Municipality of Halton (Respondent).

Unit #1: "all employees of the Regional Municipality of Halton in its Halton Centennial Manor at Milton, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate dieticians, student dieticians, office and clerical staff, persons employed for not more than 24 hours per week, students employed during the school vacation period and/or on a co-operative study program at a university or a community college and persons covered by a collective agreement between the respondent and International Brotherhood of Electrical Workers, Local 636." (146 employees in the unit). (*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

**0134-79-R:** Retail Clerks Union, Local 486 chartered by the Retail Clerks International Union (Applicant) v. The Salvage Store Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in retail stores owned and/or operated by the respondent in the City of Ottawa, save and except store managers, persons above the rank of store manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in the unit).

**0342-79-R:** Service Employees Union Local 268 (Applicant) v. Westmount Hospital (Respondent).

Unit: "all employees of the respondent at its hospital at Thunder Bay regularly employed for not more than twenty-four hours per week save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and persons covered by subsisting collective agreements." (29 employees in the unit). (*Having regard for the aforementioned agreement of the parties*).

**0345-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. D and J Manufacturing Co. Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

**0351-79-R:** International Woodworkers of America (Applicant) v. Noble Trophies Limited (Respondent).

Unit: "all employees of the respondent at Brampton, Ontario save and except foremen or foreladies, those above the rank of foreman or forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in the unit).

**0420-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Eastern Canada Contractors Limited and/or Eastern Canada General Contractors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**0431-79-R:** Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC (Applicant) v. George W. Endress Company Limited (Respondent) v. Group of Employees (Objectors).



Unit: “all employees of the respondent at its plant in Waterford, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons employed regularly for not more than twenty-four (24) hours per week and students employed for the summer vacation period.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

**0456-79-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Uxbridge Beverages (Oshawa) Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: “all office and sales staff of the respondent at its plant in Oshawa, Ontario save and except supervisor, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (3 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #2: “all employees of the respondent at its plant in Oshawa, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff and sales manager.” (4 employees in the unit). (*Certified*).

Unit #3: “all employees of the respondent at its plant in Oshawa, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, sales manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (21 employees in the unit). (*Certified*).

**0488-79-R:** Ontario Nurses’ Association (Applicant) v. Laurier Manor Limited (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity at Laurier Manor Limited, Ottawa, save and except the Director of Nursing and persons above the rank of Director of Nursing.” (17 employees in the unit). (*Clarity note*).

**0489-79-R:** Ontario Nurses’ Association (Applicant) v. The Lady Dunn General Hospital (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity at the Lady Dunn General Hospital, Wawa, Ontario, save and except the nursing supervisor, and persons above the rank of nursing supervisor, and persons regularly employed for not more than twenty-four (24) hours per week.” (8 employees in the unit).

Unit #2: “all registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity at the Lady Dunn General Hospital, Wawa, Ontario, save and except the nursing supervisor and persons above the rank of nursing supervisor.” (12 employees in the unit).

**0490-79-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #704 (Applicant) v. Muzzatti Steel Limited (Respondent).

Unit: “all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff.” (6 employees in the unit).

**0492-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Keep Kleen’s Limited (Respondent).

Unit: “All carpenters and carpenters’ apprentices in the employ of the respondent within a radius of

thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**0495-79-R:** Canadian Food and Allied Workers Union Local 725 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Peoples Division of Marks & Spencer Canada Inc. (Respondent).

Unit: “all employees of the respondent in its store in Hearst, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during off school hours and during the school vacation period.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

**0498-79-R:** United Plant Guard Workers of America Local 1962 (Applicant) v. Toronto Transit Commission (Respondent).

Unit: “all security investigators employed by the respondent in the Municipality of Metropolitan Toronto save and except supervisors, those above the rank of supervisor, office and clerical employees and students employed during the school vacation period.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

**0499-79-R:** International Printing & Graphic Communications Union (Applicant) v. Alman Publishers and Printers (Espanola) Limited O/A Journal Printing (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed at Sudbury, Ontario, save and except foremen and persons above the rank of foreman, sales staff, office staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (65 employees in the unit). (*Having regard to the agreement of the parties*).

**0500-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Culross Products Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (126 employees in the unit). (*Having regard to the agreement of the parties*).

**0501-79-R:** London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Alexandra Hospital (Respondent) v. International Union of Operating Engineers Local 772 (Intervener).

Unit: “all employees of the respondent at Ingersoll, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by a subsisting collective agreement.” (21 employees in the unit). (*Having regard to the agreement of the parties*).

**0518-79-R:** United Rubber, Cork, Linoleum and Plastic Workers of America (Applicant) v. Goodyear Canada Inc. (Respondent).

Unit: “all employees of Goodyear Service Stores, A Division of Goodyear Canada Inc., located at

3520 Etude Drive, Malton, Ontario save and except service managers, persons above the rank of service manager, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (4 employees in the unit). *(Having regard to the agreement of the parties).*

**0521-79-R:** Canadian Union of Public Employees (Applicant) v. Brock University Student Union Inc. (Respondent).

Unit: “all employees of Brock University Student Union Inc. employed at Brock University in St. Catharines, Ontario in the operations of Brock University Student Union Inc. save and except volunteers, members of the Brock University Student Administrative Council, Business Manager, Manager of Central Advertising Bureau, Manager of the General Brock Store and persons above those ranks, persons regularly employed for not more than twenty-four hours per week and persons engaged on a casual basis whose remuneration is by honorarium or on a per function basis.” (9 employees in the unit). *(Having regard to the agreement of the parties).*

**0535-79-R:** Office and Professional Employees International Union (Applicant) v. Customs Excise Union (Respondent).

Unit: “all employees of the respondent working at and out of Ottawa-Carleton, save and except the National President, the Director of Staff Relations and those employees presently covered by OPEIU – 225 Contract.” (7 employees in the unit). *(Having regard to the agreement of the parties).*

**0545-79-R:** United Steelworkers of America (Applicant) v. NTN Bearing Mfg. Canada Ltd. (Respondent).

Unit: “all employees of the respondent in the City of Mississauga save and except supervisors, persons above the rank of supervisor, office and sales staff.” (52 employees in the unit). *(Having regard to the agreement of the parties).*

**0551-79-R:** Comco Employees Association (Applicant) v. Comco Metal & Plastic Industries Ltd. (Respondent).

Unit: “all employees of the respondent at Port Perry, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (86 employees in the unit).

**0552-79-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C., Community Legal Services Section (Applicant) v. Mississauga Community Legal Services (Respondent).

Unit: “all persons employed by Mississauga Community Legal Services in the Regional Municipality of Peel save and except staff lawyers.” (5 employees in the unit).

**0560-79-R:** Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Travelways School Transit Limited (Lindsay, Peterborough Division) (Respondent).

Unit: “all employees of Travelways School Transit Limited (Lindsay, Peterborough Division), save and except Foremen, Manager, persons above the rank of Manager, and office and sales staff.” (120 employees in the unit).

**0561-79-R:** Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Travelways School Transit Limited (Port Elgin, Kincardine Division) (Respondent).



Unit: "all employees of Travelways School Transit Limited (Port Elgin – Kincardine Division) save and except Foremen, Manager, persons above the rank of Manager, and office and sales staff." (110 employees in the unit).

**0565-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Ball Brothers Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**0566-79-R:** Canadian Food and Allied Workers Union Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all employees of the respondent in its stores in Tilbury, Ontario, regularly employed for not more than 24 hours per week, students employed during off-school hours and during the school vacation period." (28 employees in the unit). (*Having regard to the agreement of the parties*).

**0568-79-R:** Bray Rivet & Machine Employees Association (Applicant) v. Bray Rivet & Machine Company Ltd. (Respondent).

Unit: "all employees of the respondent at Gananoque, save and except foremen, persons above the rank of foreman, office and sales staff." (31 employees in the unit). (*Having regard to the agreement of the parties*).

**0586-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Goodland Gardens Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 75 Eastdale Avenue, Toronto, save and except property managers, persons above the rank of property manager, office, clerical and sales staff and persons regularly employed for not more than twenty-four hours per week." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**0589-79-R:** Canadian Union of Public Employees (Applicant) v. The Elmira and District Association for the Retarded (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of The Elmira and District Association for the Retarded employed in Arc Industries in Elmira and Reid Woods Residence, in Woolwich Township, save and except the Manager of Arc Industries, the Manager of Reid Woods Residence, the Bookkeeper-Secretary and persons above those ranks, persons employed on special grants, volunteers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (12 employees in the unit). (*Having regard to the agreement of the parties*).

**0595-79-R:** Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. John Forsyth Co. Limited (Respondent).

Unit: "all employees of the respondent at 36 Horner Avenue, Toronto, save and except foremen, foreladies, persons above the rank of foreman or forelady, office and clerical staff, sales staff, persons regularly employed for less than twenty-four hours per week and students employed during a vacation period." (18 employees in the unit). (*Having regard to the agreement of the parties*).

**0596-79-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Russell MacVicar Limited (Respondent).

Unit: "all employees of the respondent at Leamington, Ontario save and except foremen, those above the rank of foreman, office and sales staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**0599-79-R:** Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Travelways School Transit Limited, (Markham Division) (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent (Markham Division), save and except Foremen, Manager, persons above the rank of Manager, Office and Sales Staff and Maintenance Staff." (180 employees in the unit).

**0603-79-R:** Canadian Food and Allied Workers Union Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all employees of the respondent in its retail stores in Petrolia, Ontario, regularly employed for not more than 24 hours per week, students employed during the off-school hours and during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

**0604-79-R:** Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Spencer House (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except professional medical staff, graduate nurses, undergraduate nurses, physiotherapists, occupational therapists, Director of Activities, Supervisors, persons above the rank of Supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*).

**0610-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Fidnam (Canada) Limited (Respondent).

Unit #1: "all cleaning and maintenance employees of the respondent at 65, 75, 85, 87, 89, 91, 93, 95, 97 and 99 Silver Springs Boulevard, Scarborough, Ontario, including resident superintendents, save and except Property Manager, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all cleaning and maintenance employees of the respondent at 65, 75, 85, 87, 91, 93, 95, 97 and 99 Silver Springs Boulevard, Scarborough, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Property Manager, office and clerical staff." (3 employees in the unit). (*Having regard to the further agreement of the parties*).

**0613-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 260 Dundas Street, in the City of London, in the County of Middlesex, Province of Ontario save and ex-

cept hostesses and persons above the ranks of hostess.” (42 employees in the unit). (*Having regard to the agreement of the parties*).

**0617-79-R:** Office and Professional Employees International Union (Applicant) v. Cuna of Ontario Credit Union Limited (Respondent) v. Office and Professional Employees International Union – Local 290 (Intervener).

Unit: “all office and clerical employees of the respondent at Oakville, Ontario, save and except Branch Manager and persons above the rank of Branch Manager.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

**0620-79-R:** Hotel & Restaurant Employees & Bartenders International Union Restaurant, Cafeteria & Tavern Employees Union Local 254 (Applicant) v. L. A. Catering Company Limited (Respondent).

Unit: “all employees of the respondent employed at the Ministry of Transportation and Communications in Metropolitan Toronto, save and except Assistant Manager and those persons above the rank of Assistant Manager.” (15 employees in the unit). (*Having regard to the agreement of the parties*).

**0624-79-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Jordan & Ste-Michelle Cellars Ltd. (Respondent).

Unit: “all Plant clerical personnel and laboratory technicians employed by the Respondent at St. Catharines, Ontario save and except Assistant Supervisors, Foremen, persons above the rank of Assistant Supervisor or Foreman, confidential secretary to the Winery Manager, persons employed in the Corporate and Provincial Administration, Production and Marketing Offices, students employed during the school vacation period, persons temporarily employed during vintage and persons regularly employed for not more than 24 hours per week.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

**0628-79-R:** United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: “all employees of the respondent engaged in retail sales in the town of Bradford, save and except supervisors and persons above the rank of supervisor.” (2 employees in the unit).

**0631-79-R:** The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736 (Applicant) v. Columbus Plate Limited (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*clarity note*).

**0638-79-R:** Ontario Public Service Employees Union (Applicant) v. Orphans’ Home and Widows’ Friend Society (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Kingston, Ontario, save and except the Accountant, House Manager, Director, Secretary to the Director, Senior Social Worker, Child Care Supervisor and Educational Co-ordinator.” (23 employees in the unit). (*Having regard to the agreement of the parties*).

**0639-79-R:** Ontario Public Service Employees Union (Applicant) v. Family and Children’s Services of Renfrew County operated by The Children’s Aid Society of the County Renfrew and the City of Pembroke (Respondent).



Unit: “all employees of the respondent in the County of Renfrew, Ontario, save and except supervisors and persons above the rank of supervisor.” (17 employees in the unit).

**0644-79-R:** International Union of Electrical, Radio and Machine Workers (Applicant) v. Universal Insulation Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed at Aurora, Ontario, save and except chemist, foremen, persons above the rank of foreman, office and sales staff, quality control supervisor, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (47 employees in the unit). (*Having regard to the agreement of the parties*).

**0646-79-R:** Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. Laidlaw Transport Limited (Respondent).

Unit: “all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff and persons covered by a subsisting collective agreement between the applicant and the respondent.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

**0647-79-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Toronto International Airport Limousine Operators Association (Respondent).

Unit: “all employees of the respondent working at Mississauga, save and except supervisors, those above the rank of supervisor, sales and office staff.” (10 employees in the unit).

**0648-79-R:** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Airport Taxicab Association (Respondent).

Unit: “all employees of the respondent working at Mississauga, save and except supervisors, those above the rank of supervisor, sales and office staff.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

**0653-79-R:** Laundry and Linen Drivers and Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Diversified Stainless Steel of Canada Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

**0661-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Spadco Const. Co. Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0662-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. D. W. Lucato Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**0675-79-R:** Laboaurers' International Union of North America, Local 183 (Applicant) v. Remval Constr. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**0399-79-R:** Service Employees Union, Local 204, Affiliated with A.F. of L. C.I.O. C.L.C. (Applicant) v. Toronto East General and Orthopedic Hospital Inc. (Respondent).

Unit: "all employees of Toronto East General and Orthopedic Hospital Inc. in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except Professional Medical Staff, Graduate Nurses, Undergraduate and Graduate Pharmacists, Undergraduate and Graduate Social Workers, Technical Personnel, Physiotherapists, Occupational Therapists, Psychometrists, Office and Clerical Staff, Supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (126 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	137
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	10

**0546-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America – UAW (Applicant) v. Rustshield Plating Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all employees of Rustshield Plating Limited in Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twelve (12) hours per week and students employed during the school vacation period." (26 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		26
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of intervener	10	

Applications Certified Subsequent to Post-Hearing Vote

**1674-78-R:** United Steelworkers of America (Applicant) v. Canadian Advanced Air Limited (Respondent) v. Sheet Metal Workers’ Int. Assoc., Local Union #30 (Intervener).

Unit: “all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales Staff and students employed during the school vacation period.” (17 employees in the unit).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of no union	0	
Number of ballots marked in favour of intervener	14	

**0092-79-R:** Canadian Union of Operating Engineers & General Workers (Applicant) v. The Regional Municipality of Halton (Respondent).

Unit #2: “Those persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate dieticians, student dieticians, office and clerical staff, students employed on a co-operative study program at a university or a community college and persons covered by a collective agreement between the respondent and International Brotherhood of Electrical Workers, Local 636.” (26 employees in the unit).

Number of names of persons on list as originally prepared by employer		42
Number of perons who cast ballots	23	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	8	

*(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).*

**0371-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. St. Clair Tool & Die Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Wallaceburg, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (90 employees in the unit).



Number of names of persons on list as originally prepared by the employer		88
Number of persons who cast ballots		83
Number of Spoiled Ballots	1	
Number of ballots marked in favour of the applicant	43	
Number of ballots marked against the applicant	39	

**0380-79-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent) v. United Steelworkers of America (Intervener). (*Dismissed*).

**0384-79-R:** United Steelworkers of America (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent) v. United Electrical, Radio and Machine Workers of America (UE) (Intervener). (*Certified*).

Unit: "all employees of the respondent, at 503 Woodward Avenue, Hamilton, save and except supervisors, persons above the rank of supervisor and confidential secretaries to the Branch Manager and the Service Manager." (30 employees in the unit).

Number of names of persons on list as originally prepared by employer		33
Number of persons who cast ballots		32
Number of ballots marked in favour of United Electrical, Radio and Machine Workers of America (UE)	13	
Number of ballots marked in favour of United Steelworkers of America	17	
Number of ballots marked in favour of "No Trade Union"	2	

## APPLICANTS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**2101-78-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Norlon Builders Limited (Respondent) v. Group of Employees (Objectors). (13 employees).

**2144-78-R:** Office and Professional Employees International Union (Applicant) v. Board of Ophthalmic Dispensers (Respondent). (1 employee).

**0212-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Stanley Ash Theatrical Decorators (Respondent). (2 employees).

**0473-79-R:** Local 47 Sheet Metal Workers' International Association (Applicant) v. Gerald E. Baird Contractors Ltd. (Respondent). (3 employees).

**0475-79-R:** Labourers' International Union of North America, Local 837 (Applicant), v. Dig It Contractors Ltd. (Respondent). (4 employees).

**0540-79-R:** Canadian Food and Allied Workers Union Local 633, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets A Division of Zehrmark Limited (Respondent). (2 employees).

**0577-79-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Erie & Huron Beverages Limited (Respondent). (4 employees).

**0622-79-R:** Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Peel (Respondent). (52 employees).

### Certification Dismissed Subsequent to Post-Hearing Vote

**0181-79-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Simpsons-Sears Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed as part of its Kingston Transfer Terminal Operations save and except operating section heads and manual section head and those above the rank of operating section head and manual section head, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (93 employees in the unit).

Number of names of persons on list as originally prepared by employer		86
Number of persons who cast ballots	80	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against applicant	61	

**0344-79-R:** Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. Jessel Foods Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of Jessel Foods Timmins Ontario, save and except sales staff, office manager, persons above the rank of office manager, persons regularly employed for not more than twenty-four hours per week and student employed during the school vacation period." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	2	

### APPLICATIONS FOR CERTIFICATION WITHDRAWN

**2165-78-R:** Ontario English Catholic Secondary Teachers Association (Applicant) v. St. Joseph's High School (Respondent). (14 employees).

**0312-79-R:** The Private School Teachers Association (Applicant) v. The Annex Village Campus, Inc. (Respondent) v. Employee (Objector). (9 employees).

**0435-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ethier Paving Ltd. (Respondent). (3 employees).

**0553-79-R:** United Steelworkers of America (Applicant) v. Wiscot Manufacturing Co. Ltd. (Respondent). (39 employees).

**0627-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Consolidated Concrete Structures (Respondent). (8 employees).

**0651-79-R:** The Hotel and Restaurant Employees, Local 756 (Applicant) v. U.A.W. Building Corporation, Local 199 (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304 (Intervener). (14 employees).

**0674-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Con-Elco Ltd. (Respondent). (6 employees).

**0754-79-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 2480, 2482, 1963, 3227, 1747, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Environmental Technical Services Inc. (Respondent). (4 employees).

## APPLICATION UNDER SECTION 1(4)

**0368-79-R:** United Steelworkers of America (Applicant) v. Radio Shack and A & A and Tandy Electronics Limited (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1620-78-R:** Hugh Murray (1974) Limited (Applicant) v. Carpenters District Council of Lake Ontario on behalf of Locals 397, 572, 1071, and 1450 of the United Brotherhood of Carpenters and Joiners of America (Respondent). (*Dismissed*).

**1639-78-R:** Don Hemmelskamp (Applicant) v. Christian Labour Association of Canada (Respondent) v. Mortlock Construction (1978) Limited (Intervener). (17 employees). (*Dismissed*).

**2137-78-R:** Pierre Pilon (Applicant) v. Retail Clerks Union, Local 486 (Respondent). (*Granted*).

Unit: "all employees of Crosby Food Services Ltd. employed in the Municipality of Ottawa save and except supervisors, and persons above the rank of supervisor, office and sales staff, cafeteria employees, cash room clerks, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in the unit). (*clarity note*).



Number of names of persons on revised voters' list		46
Number of persons who cast ballots	44	
Number of ballots marked in favour of Respondent	4	
Number of ballots marked against Respondent	40	

**0233-79-R:** Barbara J. McKee (Applicant) v. Toronto Typographical Union No. 91, (I.T.U.) (Respondent) v. Web Offset Publications Limited (Intervener). (*Granted*).

Unit: "Composing Room employees of Web Offset Publications Limited at 160 Duncan Mills Road, Don Mills, Ontario." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	10	
Number of spoiled ballots	1	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	9	

**0555-79-R:** Eva Friesen (Complainant) v. CUPE Local 1529 (Respondent). (3 employees). (*Granted*).

**0590-79-R:** Shane Tobin (Applicant) v. United Automobile, Aerospace & Agricultural Implement Workers of America Local 1256 (Respondent) v. Big Bear Storage Ltd. (Intervener). (5 employees). (*Granted*).

**0625-79-R:** Wesley Thompson (Applicant) v. Retail, Wholesale and Department Store Union, Local 579, representing Gifford Transfer Ltd. (1977) (Respondent). (10 employees). (*Granted*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**0269-79-R:** Ecodyne Limited (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 628, R. Brooks, et al, (Respondents) v. Ontario Hydro (Intervener # 1) v. The Electrical Power Systems Construction Association (Intervener #2) v. Mechanical Contractors Association of Ontario (Intervener #3).

- and -

**0270-79-U:** Ecodyne Limited (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 628, R. Brooks, et al, (Respondents) v. Ontario Hydro (Intervener # 1) v. The Electrical Power Systems Construction Association (Intervener #2) v. Mechanical Contractors Association of Ontario (Intervener #3). (*Granted*).

**0510-79-U:** Provident Electric Limited (Applicant) v. International Brotherhood of Electrical Workers, Local Union 303, Alex Glen and James Frolick (Respondents) v. Christian Labour Association (Intervener) (*Dismissed*).

**0570-79-U:** Cape Forming Construction Ltd., and also Westmount Engineering Construction Company Ltd. (Applicants) v. United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council; and also: Toronto Building and Construction Trades Council, and also Dave Johnson, and also: Quintin Begg (Respondents). (*Dismissed*).

**0574-79-U:** Don Hearn & Sons Trucking Limited (Applicant) v. Mike Coulson, Bill Maden, Roy Harkins and Wilfred May (Respondents). (*Withdrawn*).

**0649-79-U:** Don Hearn & Sons Trucking Limited (Applicant) v. Greg Bezair, et al (Respondents). (*Dismissed*).

**0656-79-U:** Spiers Bros. Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 1687, Lou Popovich and Russell Cooper (Respondent). (*Granted*).

## **APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL**

**0511-79-U:** The Private School Teachers Association (Applicant) v. Annex Village Campus (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR CONSENT TO PROSECUTE**

**0220-79-U:** Canadian Paperworkers Union and Holland Landing Local 1150 of the Canadian Paperworkers Union (Applicants) v. Cameron Packaging Inc. and Hugh T. Cameron (Respondents). (*Dismissed*).

**0470-79-U:** Webster Mfg. (London) Limited (Applicant) v. International Molders' and Allied Workers Union through Local 49 (London) (Respondent). (*Dismissed*).

**0544-79-U:** Webster Air Equipment Limited, 148 Stronack Crescent, London, Ontario, N6A 5A4 (Applicant) v. International Molders & Allied Workers Union Through Local 49 (London), 1086 Chippewa Drive, London, Ontario and International Molders & Allied Workers Union, 951 Dufferin Street, Toronto, Ontario (Respondents). (*Withdrawn*).

## **COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)**

**1483-78-U:** Jorge Menacho (Complainant) v. Local 247 of the Laborers' International Union of North America (Respondent). (*Dismissed*).

**1631-78-U:** Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Complainant) v. Levine Bros. Hides (Ontario) Ltd. (Respondent). (*Withdrawn*).

**1785-78-U:** Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO-CLC (Complainant) v. Levine Bros. Hides (Ontario) Limited (Respondent). (*Withdrawn*).

**1885-78-U:** Patrick Gain and David Smith (Complainants) v. Local 1565 of the International Brotherhood of Electrical Workers (Respondent) v. Great Lakes Forest Products Limited (Interested Party). (*Granted*).

**1910-78-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Superior Glove Works Limited (Respondent). (*Dismissed*).

**1977-78-U:** International Leather Goods, Plastics, & Novelty Workers' Union, Local 8 (Complainant) v. Norseman Plastics Limited (Respondent). (*Withdrawn*).

**2092-78-U:** Canadian Union of Public Employees and its Local 1320 (Complainant) v. Scarborough Centenary Hospital Association (Respondent). (*Dismissed*).

**2122-78-U:** International Leather Goods, Plastics, and Novelty Workers' Union, Local 8 (Complainant) v. Norseman Plastics Limited (Respondent). (*Withdrawn*).

**0044-79-U:** Canadian Union of Operating Engineers and General Workers (Complainant) v. AES Data Ltee/Ltd. (Respondent). (*Dismissed*).

**0104-79-U:** International Leather Goods, Plastics & Novelty Workers' Union, Local 8 (Complainant) v. Norseman Plastics Limited (Respondent). (*Withdrawn*).

**0159-79-U:** International Woodworkers of America (Complainant) v. Noble Trophies Limited (Respondent). (*Dismissed*).

**0177-79-U:** International Leather Goods, Plastics & Novelty Workers' Union, Local 8 (Complainant) v. Norseman Plastics Limited (Respondents). (*Withdrawn*).

**0217-79-U:** Service Employees' Union, Local 204 (Complainant) v. Kings Nursing Home (Respondent). (*Withdrawn*).

**0219-79-U:** Canadian Paperworkers Union and Holland Landing Local 1150 of the Canadian Paperworkers Union (Applicants) v. Cameron Packaging Inc. and Hugh T. Cameron (Respondents). (*Dismissed*).

**0308-79-U:** Canadian Union of Public Employees (Complainant) v. Peace Bridge Area Association for the Mentally Retarded (Respondent). (*Withdrawn*).

**0314-79-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Laidlaw Transportation Limited (Respondent). (*Dismissed*).

**0336-79-U:** Lake Ontario Steel Company Limited (Complainant) v. United Steelworkers of America, Local 6571 (Respondent). (*Dismissed*).

**0378-79-U:** The Amalgamated Jewelry and Allied Trades Workers' Union, Local 33, I.J.W.U., C.L.C., A.F.L.-C.I.O. (Complainant) v. The Toronto Jewellery Manufacturers' Association, Excelsior-Heinz Limited, Excellent Jewellery Company Limited, S. Fremes & Co. Ltd., Gunning Brothers Limited, George R. Mitchell & Co., Myerson Limited, Nathan Hennick & Co. Ltd., Harry Walker Jewellery Manufacturing Company Limited, Christenson Ltd., Charles Jewellery Company Ltd., Jack W. Gunning, Peter Heinz, Lou Bain, and Daniel Myerson, (Respondents).

- and -



**0379-79-U:** The Amalgamated Jewelry and Allied Trades Workers' Union, Local 33, I.J.W.U., C.L.C., A.F.L.-C.I.O. (Complainant) v. The Toronto Jewellery Manufacturers' Association, Excelsior-Heinz Limited, Excellent Jewellery Company Limited, S. Fremes & Co. Ltd., Gunning Brothers Limited, George R. Mitchell & Co., Myerson Limited, Nathan Hennick & Co. Ltd., Harry Walker Jewellery Manufacturing Company Limited, Christenson Ltd., Charles Jewellery Company Ltd., Jack W. Gunning, Peter Heinz, Lou Bain, and Daniel Myerson, (Respondents). (*Dismissed*).

**0388-79-U:** The Private School Teachers Association (Complainants) v. Annex Village Campus (Respondent). (*Withdrawn*).

**0404-79-U:** United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Complainant) v. Intercraft Industries of Canada Ltd. (Respondent). (*Withdrawn*).

**0412-79-U:** Randy Hunter (Complainant) v. International Union-United Automobile, Aerospace, Agricultural Implement Workers of America (U.A.W.) and Chrysler Canada Ltd. (Respondents). (*Dismissed*).

**0461-79-U:** Toronto Typographical Union No. 91 (I.T.U.) (Complainant) v. Goldcraft Printers (Respondent). (*Withdrawn*).

**0469-79-U:** Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC (Complainant) v. George W. Endress Company Limited Spinning Plant (Respondent). (*Withdrawn*).

**0479-79-U:** United Brotherhood of Carpenters and Joiners of America, A.F.L., C.I.O., C.L.C. (Complainant) v. Intercraft Industries of Canada Ltd. (Respondent). (*Withdrawn*).

**0483-79-U:** Tom Byers (Complainant) v. The International Association of Bridge Structural & Ornamental Iron Workers, A.F. of L. Riggers Local 721 (Respondent). (*Withdrawn*).

**0484-79-U:** The International Beverage Dispensers and Bartenders' Union, Local 280 (Complainant) v. Molly "N" Me Tavern (Respondent). (*Granted*).

**0512-79-U:** The Private School Teachers Association (Complainant) v. Annex Village Campus (Respondent). (*Withdrawn*).

**0531-79-U:** CUPE and its Local 2103 (Complainant) v. 336496 Ontario Limited (Groves Park Lodge) (Respondent). (*Withdrawn*).

**0532-79-U:** Ontario Nurses' Association (Complainant) v. Etobicoke General Hospital (Respondent). (*Withdrawn*).

**0543-79-U:** Webster Air Equipment Limited, 148 Stronack Crescent, London, Ontario (Complainant) v. International Molders & Allied Workers Union, Local 49 (London), 1086 Chippewa Drive, London, Ontario (Respondent). (*Withdrawn*).

**0548-79-U:** David Doherty (Complainant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada (Respondent). (*Withdrawn*).

**0549-79-U:** Local 47, Sheet Metal Workers International Association, Robert Fournier, Leonard Lance, and Marc Giroux (Complainants) v. Gerald E. Baird Contractors Ltd. Gerald E. Baird, and Richard Tremblay (Respondents). (*Withdrawn*).

**0550-79-U:** Andrew J. Startek (Complainant) v. Teamsters Union, Local 938 (Respondent). (*Withdrawn*).

**0575-79-U:** Gary R. Walsh (Applicant) v. Mr. John Dean and Mr. Les Kovasci (Respondents). (*Dismissed*).

**0581-79-U:** Harold George Barnett (Complainant) v. The International Brotherhood of Painters and Allied Trades (Respondent). (*Withdrawn*).

**0615-79-U:** Jerrold Lawrence (Complainant) v. Lorne Charlick, International Representative, The International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) Local 636 (Respondent). (*Withdrawn*).

**0630-79-U:** Oil, Chemical & Atomic Workers International Union, Local 9-368 (Complainant) v. Wyeth, Ltd. (Respondent). (*Withdrawn*).

**0712-79-U:** Hotels, Clubs, Restaurants, Tavern, Employees Union, Local 261 (Complainant) v. Tom Abonyi and Winco Steak N' Burger, Rib O' Beef Restaurants (Respondent). (*Withdrawn*).

**0713-79-U:** Hotels, Clubs, Restaurants, Tavern, Employees' Union, Local 261 (Complainant) v. Tom Abonyi and Winco Steak N' Burger, Rib O' Beef Restaurants (Respondent). (*Withdrawn*).

## APPLICATIONS UNDER SECTION 55

**1462-78-R:** Carpenters District Council of Lake Ontario on behalf of Locals 397, 572, 1071 and 1450 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hugh Murray Limited; Hugh Murray (1974) Limited (Respondents). (*Dismissed*).

**0240-79-R:** Hotel & Restaurant Employees & Bartenders Union Local 604, A.F.L.-C.I.O.-C.L.C., Peterborough, Ont. of the Hotel & Restaurant Employees & Bartenders International Union (Applicant) v. Marathon Investments Limited (Respondent). (*Dismissed*).

**0267-79-R:** Retail Clerks Union, Local 206, chartered by Retail Clerks International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Dominion Stores Limited (Respondent) v. United Steelworkers of America, Locals 14974 and 14045 (Intervener). (*Dismissed*).

**0482-79-R:** Canadian Union of Public Employees (Applicant) v. City of Kanata (Formerly Township of March) (Respondent). (*Withdrawn*).

**0578-79-R:** Retail Clerks Union, Local 206, Chartered by United Food and Commercial Workers International Union (Applicant) v. Anthony Schmidt, 12 James Street, Hamilton, Ontario (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

**1423-78-M:** Canadian Union of Public Employees, Local 1328 (Applicant) v. Metropolitan Separate School Board (Respondent). (*Withdrawn*).

**0116-79-M:** Ottawa Board of Education Employees Association (Applicant) v. Ottawa Board of Education (Respondent). (*Granted*).

**0274-79-M:** International Brotherhood of Electrical Workers, Local Union 636 (Applicant) v. The Hydro-Electric Commission of Cambridge and North Dumfries (Respondent). (*Withdrawn*).

**0413-79-M:** Canadian Chemical Workers Union, Local 21 (Applicant) v. Cyanamid of Canada Limited (Respondent). (*Withdrawn*).

**0450-79-M:** Canadian Union of Public Employees Local 1600 (Applicant) v. Metropolitan Toronto Zoo (Respondent). (*Withdrawn*).

## APPLICATIONS UNDER SECTION 112A

**1827-78-M:** The Ontario Allied Construction Trades Council, and The International Union of Operating Engineers, Local 793 (Applicants) v. The Electrical Power Systems Construction Association, Alnor Earthmoving Limited, Rumble Contracting Limited and Alnor Earthmoving Limited and Rumble Contracting Limited, carrying on business as Alnor-Rumble-Joint Venture (Respondents). (*Granted*).

**0039-79-M:** Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and the Labourers' International Union of North America, Local 1059 (Applicants) v. Labourers' Council of Employer associations, Evans-Kennedy Construction Limited and Celtic Construction (London) Ltd. (Respondents).

- and -

**0040-79-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Rodmen Employer Bargaining Agency, Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents).

- and -

**0041-79-M:** Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, and The United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicants) v. Carpenters' Employer Bargaining Agency, Evans-Kennedy Construction Limited, and Celtic Construction (London) Ltd. (Respondents).

- and -

**0042-79-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicants) v. The Masonry Industry Employers' Council of Ontario, Evans-Kennedy Construction Limited and Celtic Construction (London) Ltd. (Respondents).

- and -

**0043-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Operating Engineers' Employers' Agency, Evans-Kennedy Construction and Celtic Construction (London) Ltd. (Respondents). (*Granted*).



**0199-79-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Apartment Builders Association – and – 360 501 Ontario Limited (Respondents). (*Withdrawn*).

**0487-79-M:** International Union of Operating Engineers, Local 793 and its member, Jean Dumais (Applicant) v. Employer Bargaining Agency and Nadrofsky Steel Erecting (Respondent). (*Granted*).

**0494-79-M:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Association of Millwrighting Contractors of Ontario; Moody S.I. Limited (Respondent). (*Granted*).

**0497-79-M:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Steds Limited or Stedstell Buildings (Respondent). (*Withdrawn*).

**0513-79-M:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Global Masonry Co. (Respondent). (*Granted*).

**0514-79-M:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Star Masonry Contractors (Respondent). (*Withdrawn*).

**0558-79-M:** Labourers' International Union of North America, Local 506 (Applicant) v. Q. Sons Construction Company Limited (Respondent). (*Withdrawn*).

**0576-79-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Introm Industries Limited (Respondent). (*Withdrawn*).

**0689-79-M:** Labourers' International Union of North America, Local 247 (Applicant) v. C E Refractories (Respondent). (*Withdrawn*).

**0698-79-M:** A Council of Trade Unions, acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto Sewer and Watermain Contractors' Association (Respondent). (*Withdrawn*).

**0709-79-M:** A Council of Trade Unions, acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto and Building Association (Respondent). (*Withdrawn*).

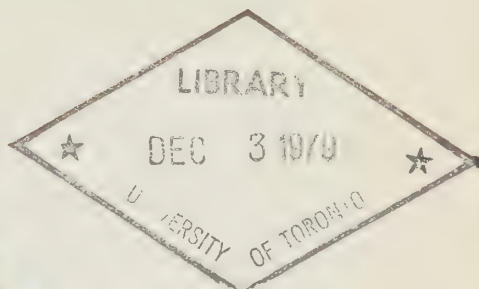
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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
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**0802-79-R** Aclo Compounders Inc., Employees' Association, (Applicant),  
v. **Aclo Compounders Inc.**, (Cambridge-Hespeler, Ontario), (Respondent),  
v. United Steelworkers of America, (Intervener).

**Certification – Trade Union Status – Meeting adopting constitution and admitting employees into membership forming trade union – Using employer's premises and stopping production for meeting – Whether union receiving "other support" from employer.**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members H. J. F. Ade and W. F. Rutherford.

**APPEARANCES:** *S. J. First, Douglas Harney and Alex Hill for the applicant; Donald R. Young for the respondent; Lorne Ingle, Q.C., Marion Tobin and Frank Wadden for the intervener.*

**DECISION OF THE BOARD;** September 19, 1979

1. This is an application for certification in which the applicant is required to establish its status as a trade union within the meaning of section 1(1)(n) of the Act.

2. The intervener is presently the bargaining agent for employees of the respondent in the bargaining unit which the applicant seeks to represent.

3. The applicant purports to have become a trade union by virtue of certain steps taken at a meeting of employees of the respondent held on July 17, 1979. In support of its application the respondent filed a constitution and the minutes of the meeting held on the 17th in typewritten form signed by Stephen J. First, who is the solicitor for the applicant, and who attended the meeting. Also filed at the hearing are the original handwritten notes of Mr. First.

4. The intervener submits that the application should be dismissed because the Association was not properly organized as a trade union and because of the interference of the respondent company in the attempted formation of the applicant. The intervener alleges that the respondent has violated section 12 of the Act. The section provides:

"The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin."

5. Douglas Harney, who had been elected President of the applicant at the July 17th meeting, testified with respect to the manner in which the meeting of July 17th originated and to the proceedings at that meeting. With respect to the matter of status, the evidence given by Harney is that the meeting which was attended by the solicitor who had drafted the constitution, opened with a general discussion by him of the merits of representation by the Steelworkers versus that by an employee organization. This discussion was followed by a secret vote on the question. The evidence is that of 26 ballots cast, 17 were cast in favour of an association and 9 against.

6. There is no dispute that the proposed constitution was passed around among the employees at the meeting and that some discussion took place concerning its terms.

7. It is also clear that a vote was taken and that the constitution was unanimously adopted by those present at the time. Membership applications, together with \$1.00 payments, were signed and received during the course of the meeting and officers were elected.

8. There was disparity in the evidence as to the sequence in which these events took place. The Board was presented with typewritten minutes prepared and signed by the solicitor which Harney identified as reflecting the course of the meeting. There were also filed the rough notes taken by the solicitor at the meeting upon which the typewritten version was said to be based. The sequence of events as set out in the rough notes appears to differ from documents record the same happenings. It is thus clear that the signing of membership cards, the election of officers and the adoption of the constitution all occurred at this meeting, whatever the exact sequence may have been.

9. In the *Hotel Dieu Hospital* case, [1969] OLRB Rep. June 367, the Board said at pp. 367-368:

“... We are of opinion that where a constitution is adopted at a meeting and the persons who adopted the constitution became members of the organization at the same meeting at which the constitution is adopted, the Board would be taking a very technical position if it distinguished in point of time between the signing of members and the adoption of the constitution. If the signing of members and the adoption of the constitution take place at the same meeting they should be deemed to have taken place simultaneously. It therefore is of little consequence whether the persons in attendance at the meeting were enrolled as members prior to the adoption of the constitution or whether the constitution is adopted prior to the enrollment of the members so long as these events take place at the same meeting. If everything is done at the one meeting no subsequent confirmation or ratification is necessary ...”

10. Applying the reasons in the *Hotel Dieu Hospital* decision, *supra* to the evidence in the present case, the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

11. It now becomes necessary to deal with the allegations with respect to section 12. In this regard, it is not without significance that up to the date of the hearing, Harney also held the office of President of the United Steelworkers Local at the respondent's plant. He identified himself as such at the hearing. There was also evidence that, prior to his being elected President of the Steelworkers Local, he had circulated a document among the employees in the bargaining unit which carried the following heading:

“We the undersigned request release from the United Steelworkers of America Union Local 8716. We agree to pay the sum of one dollar per employee for the liquidation of this present local.”

12. The above document was dated 8 May 1979 and was signed by 34 persons. Whatever else may be said about it, the document can have left no doubt in the minds of those who signed it as to where Harney stood with respect to United Steelworkers. However, notwithstanding that, Harney was later elected President of the Local, thereby displacing an incumbent president. This is part of the relevant background against which the events of July 17th took place.

13. At about 4:00 p.m. on July 17th, while the plant was in operation, Harney, who, as we have noted, was then President of the intervener's local, approached Donald R. Young, a senior management person, to ask his permission to hold a meeting of the employees. His evidence was that he asked the management to close down the machinery and to assemble all the employees. Young at first objected to closing down the machinery but eventually was persuaded to shut down the whole plant for half an hour so that employees might attend the meeting. At the request of Harney, an announcement was made over the plant's intercom by an office employee advising the plant employees of the meeting in the plant cafeteria and authorizing the shutdown of the machines. There is no evidence that the purpose of the meeting was announced. The meeting was held in the company's cafeteria and went on until about 4:30 or 4:45 with some employees remaining until 5:30 p.m.

14. It was Harney's evidence that management was not aware of the purpose of the meeting and did not ask the reason why it was so urgent as to require the shutdown of the plant. It must have been clear to management, however, in view of Harney's position as President of the Local, that the meeting had something to do with the union or with labour relations matters. Young, who was present at the hearing, volunteered that he did not know enough about labour relations to understand the situation and had reluctantly consented to the shutdown. He also said that he did not inquire as to why the meeting was called. This is something we find hard to accept in view of the obvious loss of production, however slight, that a shutdown would involve. In any event, the Board has said that in matters such as this, even if management may have acted in good faith, it may nevertheless, by its action, contribute such "other support" to the formation of an applicant union as to cause the Board to reject the application by reason of the provisions of section 12 of the Act (*Microdent Laboratories Ltd.*, [1969] OLRB Rep. Oct. 852).

15. The evidence is clear that in the present case the employer permitted an announcement of a meeting of employees to be made over the company's public address system by the receptionist who regularly makes announcements on behalf of management. Management directed the shutdown of the production machinery (an action which must have resulted in some financial loss to itself) in order for the employees to attend the meeting. Although it was not clear on the evidence that employees were told they had to attend the meeting, the above incidents, particularly since they occurred during regular working hours, must certainly have indicated to the employees that attendance was mandatory. In addition to the foregoing, the cafeteria premises were provided to the organizers of the applicant free of charge.

16. The Board has said in a number of cases dealing with the formation of a trade union that the gratuitous use of company premises where the company was aware of the purpose of the meeting was sufficient "other support" to invoke the prohibition contained in section 12. (See *Kenora District Home for the Aged*, [1960] OLRB Rep. Apr. 28; *Queen Elizabeth Hospital (Toronto)*, [1961] OLRB Rep. May 39; *Canadian Home Products Lim-*



*ited (Niagara Falls)*, [1961] OLRB Rep. Aug. 158; *Burlington-Nelson Hospital*, [1962] OLRB Rep. Nov. 285; *Gillies Brothers and Company Limited*, [1964] OLRB Rep. Dec. 420 and *Kemp Products Limited*, [1966] OLRB Rep. Apr. 39.)

17. There is no direct evidence that the company was aware of the precise purpose of the meeting. However, in view of the prior activities of Harney in opposition to the Steelworkers, a fact which must have been well-known to virtually everyone in the plant following the circulation of the document of May 8th referred to above, we are driven to the ineluctable conclusion that the company must have been aware that Harney's urgent request for, and his insistence on the need for a meeting in the face of Young's first refusal, had something to do with the displacement of the incumbent. It would be incredible, notwithstanding his election (or perhaps because of his election) as President of the incumbent, which he publicly declared he wanted to liquidate, that management could be entirely unaware of what was transpiring in so small a bargaining unit. In any event, we find that the free use of the intercom and, particularly, the shutdown of the plant, amount to "other support" within the meaning of section 12 of the Act. It is also plain that these acts of the respondent must have been seen by the employees as supportive of the applicant.

18. Upon taking all of the foregoing incidents and findings into account, the Board finds that the respondent has lent such "other support" to the formation of the applicant as to prohibit the Board from certifying the applicant, having regard to the provisions of section 12 of the Act.

19. The application is accordingly dismissed.

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**2164-78-R Canadian Union of Industrial Employees, Applicant, v. Bermay Corporation Limited, Respondent, v. Goldcrest Furniture Ltd., Intervener.**

**Practice and Procedure – Representation Vote – Right of Access – Employer refusing access to union scrutineers – Board not selecting scrutineer – Employer directed to give access to union scrutineer.**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and D. B. Archer.

**DECISION OF THE BOARD;** Sept 14, 1979

1. By decision dated July 12, 1979, [1979] OLRB Rep. July 608 the Board ordered the taking of a representation vote among the employees in the bargaining unit herein. According to correspondence from counsel for both parties there has been a failure to agree on the persons who will act as scrutineers. Both parties ask the Board to make an order to resolve the impasse.

2. The representation vote arises out of an application under section 55 of the Act. The Board, by majority decision, determined that the sale of a business to the respondent has taken place within the meaning of the Act. Because the evidence established that the re-

spondent has intermingled its own former employees with the employees of the predecessor employer, the Board exercised its discretion under section 55 of the Act to order the taking of a representation vote.

3. The union has put forth the names of Mr. P. Dorfman, its president and, in the alternative, Mr. M. Hurde, its secretary-treasurer, to act as scrutineer for the union on the taking of the representation vote. Counsel for the respondent submits that the union must choose its scrutineer from among the respondent's employees. The respondent takes the position that it is not prepared to allow either Mr. Dorfman or Mr. Hurde on the company's premises and that the Board is without jurisdiction to order it to do so. The respondent requests that the Board select a scrutineer from among its employees or, in the alternative, order the union to do so.

4. The Board does not accept the respondent's narrow interpretation of the Board's jurisdiction in the administration of representation votes. In almost all cases representation votes are conducted on the employer's premises with the cooperation of both parties and without the need of any affirmative order by the Board. Occasionally, however, some disagreement may arise. The legislature has granted to the Board the latitude to deal with problems of that kind. Section 92(2)(f) of the Act specifically provides as follows:

“(2) Without limiting the generality of subsection 1, the Board has power,

- (f) to enter upon the premises of employers and conduct representation votes during working hours and give such directions in connection with the vote as it considers necessary;”

It would, in our view, effectively defeat the purpose of the section if it were restricted so as to allow only the Board or its officers and not the officers or representatives of the union, upon the order of the Board, to enter the employer's premises for the purposes of a vote.

5. Representation votes under the Act are tripartite. They are run by the Board with the participation of both union and employer. Normally each party is permitted to select one scrutineer to be present at each polling place during the vote. The vote should be conducted in a calm and dispassionate atmosphere that is as nearly as possible devoid of any association with the previous campaign propaganda of the parties. When the person acting as scrutineer is identified with the voting campaign of either party his presence at the polling station may have an unsettling effect on persons presenting themselves to vote. The Board has therefore tended to prefer, wherever possible, rank and file employees rather than managerial personnel or union officers in the role of scrutineer. A further consideration is that the rank and file employee can be familiar with the personnel of the plant and assist in the identification of voters. But while that is the preference of the Board it is not an absolute requirement. (*Swingline of Canada Ltd.* [1971] OLRB Rep. Nov. 710; *I.R. Menard Ltd.* [1972] OLRB Rep. Oct. 915; *Scarborough Centenary Hospital Association* [1979] OLRB Rep. April 350)

6. The purpose of any representation vote is to provide an expeditious way of determining the wishes of the employees. In keeping with its policy of getting representation votes on as quickly as possible the Board leaves to each party the selection of its scrutineers. While it cannot prejudge the merits of any objection to a scrutineer, the Board prefers that wherever possible the vote proceed and any objections be sorted out later. To that end the

Board will do whatever is required to permit the attendance at the vote of scrutineers chosen by the parties, with the caveat that by doing so it does not necessarily endorse their selection.

7. In this case the Board knows little about the dispute between the parties. In her letter to the Board counsel for the union suggests that identification with the union cause would subject a rank and file employee to some risk. Counsel for the employer advances no reasons for wishing to exclude the union officers as scrutineers. Whatever the eventual outcome, the Board should not encourage an approach that limits the freedom of choice of the parties or risks undue delay and frustration of the process by which bargaining rights are meant to be expeditiously determined. For the foregoing reasons it denies the employer's request that the Board either order the union to name a plant employee as its scrutineer or that the Board make the nomination itself. Furthermore, the Board cannot countenance any interference by the employer with the right of the union to have its chosen representative present as scrutineer on the company's premises for the taking of the vote. The Board therefore orders that Mr. P. Dorfman or Mr. M. Hurde, the two officers proposed by the union as scrutineers, or such other person as the union may designate, be allowed to enter the respondent's premises and fulfill, without interference, all of the functions of scrutineer upon the taking of the representation vote ordered herein.

8. The matter is referred to the Registrar.

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**0654-79-JD** Local 1330, United Paperworkers International Union, Kenora Ontario, Complainant v. **Boise Cascade Canada Ltd.**, Respondent.

**Jurisdictional Dispute – Board reviewing relevant criteria – Collective agreement and past practice favouring complainant – Nature of work and efficiency and economy favouring respondent – Whether Board changing work assignment**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members D. B. Archer and E. C. Went.

**APPEARANCES:** *Gilbert Hay, Lyle Hudson, Robert Freeman and R. W. Gangloff for the complainant; D. I. Wakely, R. D. Mosher and W. C. McKinnon for the respondent.*

**DECISION OF THE BOARD;** September 28, 1979

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2. The complainant trade union, Local 1330, United Paperworkers International Union, Kenora Ontario, has requested the Board to issue a direction under section 81 of *The Labour Relations Act* with respect to an assignment of work which the respondent has made to members of the International Association of Machinists and Aerospace Workers, Local 490 ("the Machinists") which is disputed by the complainant. The work in dispute is the driving of a vehicle referred to as a "welding truck".



3. The facts in this complaint are not in dispute. The respondent operates a pulp and paper mill in Kenora, Ontario which employs approximately 950 hourly paid employees who are represented in collective bargaining by five trade unions, including the complainant and the Machinists. The complainant represents approximately 550 employees including persons employed in the classifications truck driver and transport driver-highway. The Machinists hold bargaining rights for various maintenance trades, including welders, but not for truck drivers.

4. The respondent introduced the welding truck in February 1979. It is a flat bed truck with a piece of welding equipment bolted to the deck of the truck. The respondent assigned the task of driving this truck to the welders who use the equipment. No other employees drive it. The truck is driven to the location where the welding equipment is needed and remains there while the welder performs the work. The complainant is seeking to have the job of driving the welding truck assigned to truck drivers in its bargaining unit. It is not seeking to have a particular driver assigned to the truck, or to have a driver assigned full-time to the truck. Rather the complainant contends that truck drivers from its bargaining unit should be assigned to the welding truck in the same manner as they are assigned to the respondent's mill trucks, that is by seniority. The respondent contends that the welding truck, in essence, is a tool of the welding trade the driving of which is properly assigned to its welders who are members of the Machinists' bargaining unit. The complainant and the company have discussed their differences under the terms of a new clause in the current collective agreement which requires the company to discuss with the union "any significant changes in job content or work assignments" before instituting the changes. They were unable to agree on the work assignment, so the complainant initiated the complaint which is before this Board.

5. Section 81 of the Act gives the Board the discretion to inquire into a complaint that an employer has assigned or is going to assign particular work to persons in one trade union rather than to persons in another trade union and the discretion to direct what any affected party shall do or not do with respect to the assigned work. A variety of criteria is considered by the Board in exercising its discretion and the criteria which it finds useful in the instant case are: the collective agreements between the respondent and the complainant and the Machinists; skill and training; safety; past practice; the nature of work; employer's preference; and efficiency and economy. The Board's assessment of the significant facts relating to each of these criteria are as follows.

### COLLECTIVE AGREEMENTS

6. There is no classification of truck driver in the Machinist's collective agreement, but the complainant's collective agreement contains the classifications of truck driver and highway driver-transport. While the presence of job classifications in the collective agreement is not by itself determinative of work jurisdiction, the respondent acknowledges the jurisdiction of the complainant over the work of truck driving. This clearly favours the complainant if the work in question is simply truck driving.

### SKILL AND TRAINING

7. The respondent requires only that drivers of the welding truck have a driver's license. This favours neither the complainant nor the Machinists.

## SAFETY

8. There is no evidence before the Board of any particular safety requirements for this job, other than those inferred from the need to hold a driver's license and from the fact that the job entails driving a vehicle on private property as well as public thoroughfares. This favours neither the complainant nor the Machinists.

## PAST PRACTICE

9. There is no area practice by which the Board can be guided and there is no evidence before the Board of any past practice of the respondent with respect to the vehicle in question. There is, however, a history of the truck drivers transporting portable welding equipment around the mill site and to the power houses. The welding truck's welding equipment was an addition to other portable welding equipment used by the respondent. All but one of these pieces of equipment are transported on the forks of a lift truck to the location where they are needed. Another larger piece of equipment is mounted on wheels and when it is required it is transported in one of several ways. The most common means is to suspend it from the boom of a "bull-moose", a boom-type heavy duty lift truck. The "bull-moose" is driven by a member of the International Union of Operating Engineers. Transporting the welding equipment in this manner requires also the use of a rigger who is a member of the Machinists. When the "bull-moose" is not available to transport the equipment, it is sometimes used to hoist the welding equipment onto the three-ton truck, which then hauls the equipment to the location where it is needed. This method does not require the rigger. If neither of these means of hauling is available, the welding equipment may be towed by one of the other mill trucks, including a lift truck, to the location where it is needed. Whenever this wheel-mounted welding equipment is transported by one of these means, once it is deposited where it is needed, the driver involved returns with his vehicle to his normal work assignment.

## THE NATURE OF THE WORK

10. The complainant considers the job of driving the welding truck to be the same as driving any of the respondent's mill trucks. Therefore, in keeping with this view, any time a driver is needed for the welding truck, the respondent should assign one of the regular truck drivers to it by the same procedure as it used for assigning drivers to the mill trucks. As the term implies, the respondent's mill trucks are used primarily within the mill property which is about a half mile in length. They may have to go outside of the mill to the Norman power house, a distance of five miles or to another one two miles from the mill. The mill trucks consist of a crew cab used on a day shift for transporting employees and their tools; a tandem truck and a three-ton truck used on the day and afternoon shifts for hauling refuse from the mill; a garbage truck normally used on day shift and a number of lift trucks. Drivers are assigned to the mill trucks according to seniority and they may be moved from one vehicle to another which may result in chain reaction bumping. The transport drivers are also assigned by seniority to driving the transport trucks and when there is a shortage of that work, they may bump into a job of driving one of the mill trucks, again causing chain reaction bumping.

11. The mill trucks serve the primary purpose of transporting employees and materials and are in almost constant use for this purpose during the shifts to which they are assigned. Their use requires drivers whose full-time job is to drive the vehicles and perform

any other tasks incidental thereto. The welding truck, on the other hand, is in use only when its welding equipment is needed at a location where there is welding to be done. The welding truck is a unit combining a vehicle and welding equipment and the primary purpose of the combined unit is focused in the welding equipment. When that equipment is needed the welder assigned to the job drives the truck to the job and parks it there until the job is completed. The potential driving distances are the same as for the mill trucks. The average driving time for an eight hour shift with the welding truck is a half hour and the maximum is an hour. Thus the vehicle part of the combined unit is idle an average of seven and one-half hours out of an eight hour shift. Thus between 80% and 90% of the time that the welding truck is in use it is being operated by the welder who is using its welding equipment to ply his trade for the respondent. While the vehicle serves the important function of transporting the welding equipment, the welder and his tools to the place where they are needed, the driving of the vehicle as it is presently assigned to the welder is an incidental part of his job and the use of the welding equipment. In this regard, the nature of the work favours the Machinists.

#### EMPLOYER'S PREFERENCE

12. The employer's preference is obvious from its assignment of the disputed work to the Machinists and this favours the Machinists.

#### EFFICIENCY AND ECONOMY

13. While the welding truck supplements the other portable equipment, the clear inference on the evidence is that it is used, when available, in preference to the other equipment, particularly the large wheel-mounted one. When the truck is available, the welder can transport the equipment, his tools and himself without the delay of waiting for another driver and/or vehicle. By contrast, when the wheel-mounted equipment is used arrangements must be made for a vehicle and driver to haul it. The most frequently used method is by slinging the equipment from the boom of the "bull-moose", thus diverting that vehicle plus its operator and rigger from its regular work. When the three-ton truck is used it means diverting that vehicle and its driver as well as the "bull-moose" and its driver. If a lift truck is used, again it requires the vehicle and driver to be diverted from other work. The potential for delay and disruption of work is obvious and both have occurred. Delay is primarily a problem on the day shift since on the other shifts the welders have to be called in and this allows time to arrange for a vehicle and driver. It does not, however, alter the potential for disruption of other work from which the vehicle may have to be diverted. Since the majority of the work performed by welders is unscheduled, the opportunity for delay while waiting for a vehicle and driver is significant.

14. The complainant, in asserting its claim to the work of driving the welding truck, proposes that truck drivers from its bargaining unit be assigned as needed in the same way that they were assigned to the mill trucks. This method contains similar risks of delay and work disruption because chain bumping of drivers may occur from a single request for a driver. Furthermore, when the welding truck reaches the location where it is needed, the driver must either remain there with no work to perform until the welder is finished or return to another driving assignment. If the latter, he must either take the time to walk or another vehicle must be sent to pick him up. This would be the result whether the welding job was on the mill site or at one of the power houses, the only difference would be in the magnitude of the problem and the resulting inefficiency.



15. The plain result of an assignment to the complainant would be to place the respondent in a position of choosing to use the welding truck in a way that potentially would be more inefficient than using the wheel-mounted welding equipment, or foregoing its use altogether. The efficiency and economic advantages of the present assignment clearly favour the Machinists.

16. Having regard to the foregoing criteria, the Board, for the following reasons, is of the view that the one which finally disposes of the dispute is efficiency and economy. While the admitted jurisdiction of the complainant over truck driving work is an important consideration, it is offset by the subtle but significant difference between the operation of the respondent's mill trucks and the operation of the welding truck when the singular purpose of the combined unit of vehicle and welding equipment is taken into account. In that context the collective agreement and past practice criteria are offset by the nature of the work. The consideration of efficiency and economy gives substance to the respondent's preference. The use of the welding truck under the present assignment, when contrasted with use of the wheel-mounted welding equipment, eliminates the disruption in the use of the other mill vehicles and results in more economical use of the respondent's manpower. Moreover, if effect were given to the assignment proposed by the union, the respondent would not only lose this efficiency and economy but it would be saddled with a situation that would be more disruptive and less efficient if it wished to continue to use the welding truck. All other factors are undeterminative of the disputed work.

17. Accordingly, the Board directs that the respondent continue to assign the driving of the vehicle referred to as a welding truck at its mill in Kenora to welders presently represented in collective bargaining with the respondent by the International Association of Machinists and Aerospace Workers, Lodge 490.

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**1686-78-M Stanley A. Brown, (Applicant), v. Ontario Public Service Employees Union, (Respondent Employees Organization), v. Centennial College of Applied Arts, (Respondent Employer).**

**Practice and Procedure – Reconsideration – Reconsideration sought of decision under The Colleges Collective Bargaining Act – No jurisdiction to reconsider**

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

**APPEARANCES:** *Stanley A. Brown for the applicant; G. A. Richards and R. Nabi for the respondent employees organization; no one appeared for the respondent employer.*

**DECISION OF G. GAIL BRENT, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE; September 21, 1979.**

1. The respondent union has requested the Board to reconsider its decision of March 16, 1979, [1979] OLRB Rep. Mar. 174.

2. The basic problem facing the Board is whether it has jurisdiction to reconsider its decision. The respondent union recognized this problem and brought it to the Board's attention. The question arises because the Board was given jurisdiction to consider the matter under section 54 of *The Colleges Collective Bargaining Act, 1975*. That Act was passed to remove the employees of colleges of applied arts and technology from the scheme of *The Crown Employees Collective Bargaining Act* and to place them in a position more analogous to the private sector. Pursuant to this scheme the Board was given certain specific powers by *The Colleges Collective Bargaining Act, 1975* (among them the power to make a determination under section 54) and the following additional general powers in section 83.

“(1) The Ontario Labour Relations Board shall exercise such powers and perform such duties as are conferred upon it by this Act and has power,

- (a) to enter any premises of an employer where work is being or has been done by the employees or in which an employer carries on business and inspect and view any work, material, machinery, appliance or article therein and interrogate any person respecting any matter;
- (b) to enter upon the premises of an employer and conduct representation votes during working hours and give such directions in connection with the vote as it considers necessary;
- (c) to authorize any person to do anything that the Ontario Labour Relations Board may do under clauses (a) and (b) and to report to the Ontario Labour Relations Board thereon;
- (d) to determine the form in which and the time as of which evidence of membership in an employee organization or of objection by employees to representation rights of an employee organization or of signification by employees that they no longer wish to be represented by an employee organization shall be presented to the Ontario Labour Relations Board on an application for representation rights or for a declaration terminating representation rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined; and
- (e) to administer oaths and affirmations.”

Unlike *The Labour Relations Act*, *The Colleges Collective Bargaining Act, 1975* does not contain any provision which allows the Board to reconsider one of its decisions. Because the Board's original jurisdiction was under *The Colleges Collective Bargaining Act, 1975* and because that Act does not incorporate all of *The Labour Relations Act's* provisions regarding the powers of the Board, it appears that the Board has no power to reconsider a decision rendered pursuant to its jurisdiction under *The Colleges Collective Bargaining Act, 1975*.

4. Such an omission may well have been a legislative oversight, but in determining its jurisdiction and powers the Board must be more concerned with the effect of an omission

rather than with its cause. Moreover, even though the Board is a creature of *The Labour Relations Act*, it must consider itself to be bound by the provisions of any other Act which creates a labour relations scheme and then gives or fails to give certain powers to the Board. In other words, the Board cannot assume that it will have all of its *Labour Relations Act* powers when acting as a designated body under some other Act.

5. It would appear then that having exercised its power to make a decision under section 54, the Board is *functus* in relation to that decision in the absence of authority in *The Colleges Collective Bargaining Act 1975*, the statute from which it derives its jurisdiction. See for example *Re Martin and County of Brant* [1970], 1 O.R. 1 (C.A.).

6. In the event that the Board is wrong in the determination that it lacks jurisdiction to reconsider the matter, the Board will make a determination as to whether it should entertain a reconsideration.

7. The respondent union has asked for reconsideration of a matter which was decided following a hearing at which the respondent union failed to appear. Not only did the respondent union fail to appear, but it wrote a letter to the applicant and the Board which said in essence that it was puzzled by the application but would not challenge it. (The letter is set out in the original majority decision.)

8. The Board can appreciate that the issues raised in the application are ones which are important to the respondent union and which it now may want to make the subject matter of submissions. Indeed, the Board regrets not having had the participation of the respondent union at the original hearing and not having had the benefit of its submissions. Be that as it may, the Board cannot see that the respondent union was denied notice of the issues to be determined by any defect in the application. At most, the application can be described as being ambiguous, but there is no evidence that the respondent union ever requested that the applicant give further particulars or clarification. In short, the Board does not find that there is reason to reconsider if there is jurisdiction to do so.

9. Therefore, for all of the reasons set out above, the Board decides that it lacks jurisdiction to reconsider and the application for reconsideration must be denied.

#### **DECISION OF BOARD MEMBER M. J. FENWICK:**

1. I dissent.

2. The majority of the Board has determined that the Board does not have the jurisdiction to reconsider the matter and that even if it did have such jurisdiction, that the application for reconsideration be dismissed.

3. The Board is given the authority under section 54 of *The Colleges Collective Bargaining Act* to determine whether an employee may be exempted from paying dues to the trade union. Since the Board is called upon to initially decide a matter, it is implicit that the Board can also reconsider that matter if the Board considers it advisable.

4. While I would have refused to reconsider a decision where the party seeking the reconsideration failed to appear at the original hearing and informed the Board that it did



not challenge the application, I view this case differently. The issues raised in this application are important and have far-reaching consequences, extending beyond the immediate parties to the entire trade union movement. I agree with the majority's expression of regret in not having had the benefit of the union's argument where such an issue was dealt with.

5. It is for these reasons that I would have granted the reconsideration, and for the reasons expressed in my dissent to the Board's first decision, I would have dismissed the application under section 54 of *The Colleges Collective Bargaining Act*.

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**1873-78-R** Local Union 636 of the International Brotherhood of Electrical Workers A.F.L.-C.I.O.-C.L.C., (Applicant), v. The Public Utilities Commission of the Corporation of the City of Chatham Known as **The Chatham Hydro-Electric System**, (Respondent).

**Employee – Line-foreman duties and responsibilities considered – Whether managerial**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members W. F. Rutherford and F. W. Murray.

**DECISION OF THE BOARD;** September 10, 1979

1. This is an application for certification in which the Board granted an interim certificate and appointed an Examiner to inquire into the duties and responsibilities of Albert Plouffe, Peter Doddy and Morley Merrit who are classified as line foremen.

2. The Board has read the evidence contained in the Report of the Examiner together with the written submissions with respect thereto.

3. The parties have agreed that Morley Merrit, classified as Line Foreman-Distribution, exercises managerial functions and is excluded from the bargaining unit under the provisions of section 1(3)(b) of the Act.

4. The Report records the agreement of the parties that the evidence of Albert Plouffe stands for himself in his position as Line Foreman Street Lighting and the evidence of Peter Doddy stands for himself in his position as Line Foreman Underground and Forestry.

5. In dealing with a similar problem with respect to the *Windsor Utilities Commission* case, [1971] OLRB Rep. May 296 in a section 79(2) application, the Board set out some general principles which we feel may be usefully referred to in the present instance. We would point out the fact that the foregoing case deals with persons holding a classification known as "Line Foreman" is coincidental. It was decided upon its own facts which may or may not have been similar to those before us in this case. Titles are of no significance. Each of the two jobs before this Board must be decided on its own respective facts. The general principles set out in the *Windsor* case are, nevertheless, applicable here.

6. In the *Windsor Utilities* case *supra*, the Board said, in part:

“5. Where persons are alleged to be members of management and hold positions which are claimed to be on the first level of management, it is often very difficult to ascertain on which side of the managerial line their functions fall. When the disputed persons have no real discretionary authority or power to make meaningful independent decisions and are alleged to exercise supervisory powers, the Board must determine the nature of the supervisory powers and the extent to which such supervisory powers are actually exercised. It is not sufficient to claim that such powers are contained in their job description. Managerial functions must be actually exercised. . . .

6. In large companies, the responsibilities of management are shared by a great number of persons. The functions of hiring and firing may be restricted to the head of the Personnel Department who acts on the reports and recommendations of others. In view of the fact that the functions of management are shared, not all managerial functions are exercised by any one person. A person may be solely engaged in the exercise or one of two managerial functions. So long as the functions exercised are truly of a managerial nature, it must be held that the person exercising such functions is not engaged in the performance of bargaining unit work.

7. Where a person is required to exercise functions which are of a managerial nature and is also required to perform the type of work which is performed by the bargaining unit employees, the Board must determine whether the work is merely incidental to his managerial functions or whether the functions which are of a managerial nature are merely incidental to his bargaining unit work. In order to make this determination, the Board must ascertain the nature of and the extent to which such functions are exercised. If the nature of the functions are such that they require a person to make independent decisions in meaningful matters which are of real consequence to the company's operations rather than merely the application of expertise in technical matters, or if the person exercises his unfettered discretion concerning matters of substance in the employment relationship of other persons, the nature of such functions places him on the management side of the employee-management line, no matter how much bargaining unit work the person otherwise performs. It is not uncommon in small businesses for the owner or a foreman to perform work alongside the employees and at the same time administer all phases of the management end of the business. This is less likely to happen in larger companies.

8. In larger companies, however, persons are often delegated limited managerial functions with no real independent authority or discretion. In such cases, it is necessary to determine the extent to which such functions are exercised. If a person is engaged in these functions, which are limited in their nature, for the majority of time, any other work per-

formed may be properly decribed as merely incidental to the managerial functions exercised. If, however, a person is required to perform bargaining unit work for the majority of the time and is also required to exercise managerial type functions which are of a restricted nature, the functions which are of a managerial type may be said to be merely incidental to the bargaining unit work. If the managerial type functions are merely incidental to the bargaining unit work performed, the person must be found to be an employee for the purposes of the Act.”

See also *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. April 261 and the cases cited therein.

7. In the case of Albert Plouffe, the evidence shows that he has been a line foreman since 1963. His duties involve the supervision and direction of employees with the number involved varying between one and six at one time. He assigns work to the members of his crew and, in doing so, selects the persons he deems most suitable for the different aspects of the job. He also determines priorities of jobs in the absence of direct orders. He is responsible for the quality of the work done by others.

8. It is significant, as indicated by the jurisprudence, that Plouffe devotes two-thirds of his time to the supervision and direction of other persons. During the remainder of the time he does actual physical work similar to that done by those he supervises.

9. Plouffe is sometimes on call for emergencies. He testified that he will go by himself to look at the situation giving rise to the call and if it is a matter requiring judgment, he will make the decision as to whether there is work to be done, and if he decides no work is to be done, “that’s the way it sits”. If, on the other hand, he decides there is work to be done, he calls somebody else in. In the event that he decides that only one person is required, Plouffe will do some of the physical work involved. On the other hand, if he decides that he needs more than one person on the job, he will call for more help and he will not perform any other work but will supervise and direct. These decision which were referred to by Plouffe as “judgment calls” are all managerial in nature involving, as they do, the undertaking of work and the number of bargaining unit employees to be used. The decisions are reached by Plouffe acting on his own.

10. In addition to the foregoing, Plouffe may exercise discretion in deciding whether to carry on the day’s work into overtime. The decision is limited to carry-over on the working day. Overtime work of any greater extent is authorized by his superiors on his recommendation or report.

11. Plouffe is required to make an oral assessment of probationary employees who come under his supervision. This, however, does not involve any discussion by him as to whether the individual should be retained or let go. He also attends meetings of management where he takes part in general discussions concerning the progress of certain individuals or the crews as a whole. It would appear that Plouffe’s role at these meetings is principally that of a source of information and that he is not called upon to make decisive recommendations. Sometimes, but very, very seldom, salary increases or promotions are discussed at these management meetings.



12. Plouffe also takes part in and contributes to other management meetings where work to be done and manpower requirements are discussed.

13. Insofar as discipline is concerned, the evidence discloses that Plouffe can give oral warnings or discipline. He states, however, that it is up to him to decide how far he should go on discipline and that if he concludes the matter should go further, he would then take it up with his superiors. He cannot carry out "a complete discharge". Asked if he could recommend an individual's discharge, he stated, "I don't say 'recommend discharge' but may be discussing his status as far as his work is concerned". The evidence goes no further on this point. On what evidence there is, however, it appears that Plouffe has disciplinary powers but that they are limited.

14. On the evidence taken as a whole and viewed in the light of the principles discussed in the cases cited above, we find that Albert Plouffe, Line Foreman Street Lighting, exercises managerial functions within the meaning of *The Labour Relations Act* and is excluded from the bargaining unit by virtue of section 1(3)(b) of the Act.

15. We turn now to a consideration of the evidence with respect to the duties and responsibilities of Peter Doddy, who is a foreman in the Lines Department Underground and Forestry. Mr. Doddy has been employed by the respondent for 33 years and has been a foreman for 23 of them.

16. As has already been observed, the parties have agreed that the evidence given by Plouffe was to be applied to his case while the evidence given by Doddy is to stand for him "in his position as Line Foreman Underground and Forestry". The cases cited in that part of this decision dealing with the Plouffe case are, of course, applicable to the evidence in the Doddy case.

17. There are two aspects of Doddy's job. One involves the trimming of trees and the other the installation of transformers in underground vaults. He has been classified as a foreman for some twenty-two years and supervises the work of from one to five other employees. The larger crews he supervises are concerned with the tree trimming portion of the work. In this area he supervises the work of up to five men and does little or no physical work himself. This phase of his work is carried on during three to four months of the winter.

18. The installations of transformers usually takes place between April and January. Here Doddy supervises the work of one man most of the time but sometimes that of two other persons. When he has one man, he spells him off. This action of spelling off when only one other man is on the job is a matter for his own discretion which he exercises in order to give the man a rest and because "it's good exercise". He estimated that 75% of the time he worked on vaults he would have only one man under his direction and supervision. The priority of jobs, the delegation of tasks, the inspection of the work and the decision as to whether it needs correction is up to Doddy. He directs the person who made the mistake to correct it. The job has to be done to his satisfaction.

19. In addition to these duties, Doddy is on call for emergency work. He usually has one man on call with him and may call for more men if he finds they are needed because of the size of the job. He supervises this work.

20. Doddy testified that as a foreman he is required to discipline the men working under his direction and control. He stated that the authority to discipline had always been taken for granted. His authority is limited, however, to oral warnings. If the oral discipline did not accomplish its purpose, Doddy would report the matter to his superior. He has been given no express authority to recommend discharge but was of the opinion that where "something like this was present", he would discuss it with the Assistant Superintendent or the Superintendent. He is entitled to give employees up to two hours off with pay without consultation from his superiors.

21. Doddy is consulted from time to time by the Assistant Superintendent about how certain persons are progressing in their work but no formal report is made.

22. The evidence establishes that there are days upon which Doddy works physically but never for a full eight hours and there are days when he would not work at all but would supervise. In addition, he attends management meetings. He also takes over when the Superintendent and the Assistant Superintendent are away. In that instance, he takes over and is responsible for the assignment of work in other areas.

23. The cumulative effect of the evidence with respect to Doddy is that, while his disciplinary powers are limited, the main purpose of his employment is supervisory and that what work he does is simply incidental to the main purpose of his work which is supervisory and directional. In the result then, we find on an overall view of the evidence, that Peter Doddy, as Line Foreman Underground and Forestry, exercises managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and is excluded from the bargaining unit.

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**0189-79-4 Kuldeep Singh Samra, (Complainant), v. United Glass and Ceramic Workers of North America, Local 200, (Respondent), v. Consumers Glass Company Limited, (Intervener).**

**Duty of fair representation – Union withdrawing grievance on assumption that grievor not returning to Canada – Union displaying "not caring" attitude – Board ordering arbitration of grievance**

**BEFORE:** R. A. Furness, Vice-Chairman.

**APPEARANCES:** *Michael F. Smith and K. S. Samra for the complainant; Paul Cavalluzzo, Frank Luce and Larry O'Keeffe for the respondent; A. D. Dillon and Douglas Hodgson for the intervener.*

**DECISION OF THE BOARD;** September 24, 1979

1. The name: "United Glass & Ceramic Workers of North America Local 200" appearing in the style of cause of this complaint as the name of the respondent is amended to read: "United Glass and Ceramic Workers of North America, Local 200".

2. The complainant, Kuldip Singh Samra, has complained that he has been dealt with by the respondent contrary to the provisions of section 60 of *The Labour Relations Act* and requests that he be reinstated in his employment with full seniority and compensation or that his grievance against the company be arbitrated in the usual manner by the union.
3. At the outset the respondent made its position clear that although the grievance may have lacked merit, the grievance was not withdrawn because it lacked merit. The respondent's position was that the grievance was withdrawn because it failed in an attempt to contact the complainant. Mr. Samra has been an employee of the intervener from July of 1974 until the time of his discharge on February 17, 1979. He worked as a carton assembler. On the night shift on February 17, 1979, Mr. Samra was dismissed from his employment by the intervener for allegedly threatening and assaulting a foreman. Upon the action of the intervener in removing him from the premises he consulted one of the respondent's shop stewards who brought it to the attention of the respondent's president, Mr. Laurence O'Keeffe, when the latter came on to the day shift shortly after the incident. At the time he was sent home on February 17, 1979, Mr. Samra believed that he had been dismissed from his employment and thought that the respondent would represent him.
4. At the time of the dismissal the intervener gave Mr. Samra a cheque and offered him the option of either quitting or being dismissed. It was not his wish to quit and the respondent took the position that there was "no way" he should do this.
5. Prior to his dismissal by the intervener, Mr. Samra had secured permission to take a leave of absence in order to visit his family in India. The leave of absence, including vacations, was from February 25, 1979, to April 21, 1979. Before he left for India, Mr. Samra signed the necessary papers in order for the respondent to process his grievance. Mr. O'Keeffe, according to Mr. Samra, stated that it would take three or four months at least to resolve the matter with the intervener because it seemed quite adamant in its position. Mr. O'Keeffe informed him that he should go ahead with his visit to India. Mr. Samra, accompanied by his wife and child, travelled to his native Punjab in order to visit his family.
6. Mr. Samra has lived at his present address in Toronto since November of 1977. He testified that the respondent and the intervener know his address and telephone number. Mr. Samra and his family, together with his brother, Jaspal Singh Samra, live with their landlord at the same address in Toronto. The landlord, Mohan Singh Sangha, also works for the intervener and works on the same shift as Mr. Kuldip Singh Samra. However, the evidence establishes that neither the respondent nor the intervener were aware of the fact that Mr. Kuldip Singh Samra's landlord also worked for the intervener.
7. During his stay in India, Mr. Samra was involved in a highway accident and in addition to sustaining general injuries, both bones in his right arm were fractured in a compound fracture. He was in hospital for almost a month. It had originally been his intention to return from India on April 27, 1979. However, due to the accident, which occurred on April 25, 1979, he was not able to leave India until May 27, 1979. He has evidence that this was the earliest his physician would permit him to travel. In the course of treatment for his fractured arm two operations were performed and a steel pin had to be inserted to hold the fragments of bone together along with a plaster cast. Mr. Samra's brother in Canada, Mr. Jaspal Singh Samra, was notified of the accident and managed by means of telegram and telephone to contact him. Mr. Samra asked his brother about his grievance. He was informed by his



brother that there were no news with respect to his grievance with the intervener and upon being asked to question the landlord, the landlord, Mr. Mohan Singh Sangha, informed the brother, who informed Mr. Samra, that there was no news about his grievance with the intervener.

8. Upon his return to Canada on May 28, 1979, Mr. Samra telephoned his shop steward, Donald Losier. His telephone call was returned on May 29, 1979, when Mr. Losier told him that the respondent had dropped his grievance. Mr. Samra informed the Board that the respondent had not received any notification in the mail with respect to the withdrawal of his grievance. Upon receiving the news that his grievance had been withdrawn, Mr. Samra contacted Mr. O'Keeffe and other people connected with the respondent. He was told that the respondent should fight the case and was informed that he should call back in a few days and see if the grievance could be revived. Subsequently, Mr. Samra visited the intervener's plant and met with Mr. O'Keeffe, who told him that the matter was finished. Mr. O'Keeffe told Mr. Samra that he had no information from him and pointed out that he had asked one or two East Indians when Mr. Samra was returning. He informed Mr. Samra that the East Indians told him that they did not know when Mr. Samra would return. Mr. Samra testified that at that time Mr. O'Keeffe did not indicate that any other efforts had been made to contact him. In cross-examination, Mr. Samra agreed that the respondent had treated him fairly at the time his grievance was initially being processed and that in the past the respondent had also treated him fairly in connection with a suspension he received from the intervener. He agreed that he had no complaints with respect to his past treatment by the respondent. Mr. Samra also agreed that Mr. O'Keeffe had said that there was "no way" he should quit rather than be dismissed from the intervener's employ. When Mr. Samra was asked why he had not contacted the respondent with respect to his date of return from India he replied that he had no reason to do so because he had the impression that it would take four to five months and that a hearing before the board would be three months after that. He had the impression that his grievance would take a long time to resolve. When Mr. Samra was asked why he had not had his brother contact the respondent he replied that he had not done this but added that he had asked his brother to ask the landlord whether there was anything from the intervener and that his brother had told him there was nothing from the intervener.

9. Mr. Samra's brother, Mr. Jaspal Singh Samra, testified that during Mr. Samra's absence in India he was living in the residence normally occupied by Mr. Samra. He gave evidence that he is employed as a projectionist and works six days a week from Sunday to Friday, from approximately 7:00 p.m. until approximately midnight. He is generally home until about 5:00 p.m. when he leaves the residence. He informed the Board that during the time Mr. Samra spent in India he did not receive any telephone calls from the respondent. He confirmed that Mr. Samra had asked if there was any answer from the intervener and asked him if he could speak to the landlord about it. He testified that he had spoken to the landlord and asked him if he had heard anything about his brother's grievance and was told that the landlord did not know anything. In cross-examination, the witness stated that he was generally at home before 5:00 p.m. each day with the exception of Saturday, when he did his shopping.

10. Laurence O'Keeffe, the president of the respondent, has held that office for two years. It is not a full-time job and he is also employed by the intervener. He gave evidence that he became aware of the incident which led to Mr. Samra's dismissal when he came on to his day shift, immediately following the incident. He investigated the matter together with

the intervener. As a result of interviewing persons in Mr. Samra's area of work, the intervener indicated that Mr. Samra would be dismissed. When the intervener gave Mr. Samra the option of quitting rather than being dismissed, he stated that there was no way that this would happen and that the respondent would go right through to arbitration, if necessary, in order to represent Mr. Samra. Mr. O'Keeffe confirmed that he had a conversation with Mr. Samra and that he had told him to take his trip to India because it would take two months for the two steps of grievance procedure. Mr. O'Keeffe informed the Board that at that time he believed that Mr. Samra would return to Canada in April of 1979.

11. Because this was a grievance involving a discharge, the grievance was immediately submitted to step three of the grievance procedure. After failing to resolve the matter with the intervener, on about April 12, 1979, the respondent gave the intervener written notification of its desire to submit the grievance to arbitration. The provisions in the collective agreement provide for certain time limits and Mr. O'Keeffe testified that there was never any problem in obtaining time extensions from the intervener. Mr. O'Keeffe gave evidence that he had not received any notice of withdrawal from Mr. Samra and that he called a telephone number which he had obtained from the union office and in addition spoke to two East Indians who informed him that Mr. Samra had not returned. Mr. O'Keeffe testified that he then spoke to an International President about the grievance and that in the light of the time involved a decision was made to drop the grievance because it was believed that Mr. Samra was not coming back to Canada. Two days after the grievance was withdrawn, Mr. Samra contacted Mr. O'Keeffe. Mr. O'Keeffe informed the Board that Mr. Samra had been a shop steward for a long time including the time of the last strike.

12. In cross-examination Mr. O'Keeffe confirmed that it would not require Mr. Samra's signature to submit the grievance to arbitration and that the decision to take the matter to arbitration was not in the hands of the respondent, but rather was in the hands of the respondent's International union. He explained that the International union's representative attends at step four and listens to the union's argument and that the International union has sole responsibility to go to arbitration. He stated that the group committee recommended that the grievance proceed to arbitration and that the International union had approved of this step. When asked what was to prevent the matter going to arbitration, the witness replied that the reason was that the respondent did not know when Mr. Samra would return to Canada. He agreed that there had never been any problems with respect to extensions of time in the grievance procedure between the respondent and the intervener. Mr. O'Keeffe explained that the extensions of time with respect to Mr. Samra's grievance were due to his leave of absence. He emphasized that in Mr. Samra's case the respondent was not in touch with him and did not know what was going on. When asked the telephone number he had called, Mr. O'Keeffe was unable to provide the telephone number. He was also unable to give the names of the two East Indians he had spoken to about Mr. Samra's date of return.

13. The witness explained that the grievance was withdrawn on a Monday and that it was withdrawn orally. When asked what steps he had taken in the week prior to withdrawing the grievance to contact Mr. Samra, Mr. O'Keeffe admitted he had taken no steps. He first heard of Mr. Samra's return from Mr. Donald Losier. He was asked if he had contacted the intervener to see if the abandoned grievance could be revived and he replied that he had not done this because this had not been possible in the past. Mr. O'Keeffe was asked whether he did not see that, before the dropping of the grievance and eliminating Mr. Samra's rights under the collective agreement, he had an obligation to contact him to see if he



was satisfied. The witness replied that Mr. Samra had an obligation to contact the union to find out what was going on. In re-examination Mr. O'Keeffe agreed that if the intervener were to waive the time limits the grievance would be taken to arbitration.

14. In argument the complainant posed the question of who had the obligation to contact the other side on the question of the date of Mr. Samra's return from India. The complainant argued that the grievance was the property of the respondent and was taken from Mr. Samra's control. It was emphasized that Mr. Samra was not required to attend any of the steps in the grievance procedure and that given the assurances of Mr. O'Keeffe with respect to time there was no reason for Mr. Samra to contact the respondent. The complainant adopted the position that the respondent was under a duty to contact Mr. Samra before extinguishing his rights under the collective agreement. The complainant reasoned that the respondent was under a duty to make a reasonable effort to contact Mr. Samra. It was argued that no real attempt had been made to contact him and that any real attempt would have extended beyond mere oral inquiries. The complainant stressed that there was nothing in the evidence which indicated that Mr. Samra ought reasonably to have known that his delay in India would have prejudiced his grievance. In reviewing the total relationship between Mr. Samra and the respondent, the complainant was inclined to agree that there was no foundation in past conduct which indicated bad faith within the meaning of section 60. The complainant regarded the respondent's conduct towards Mr. Samra as arbitrary and asked the Board to apply the provisions of section 37(5a) of the Act.

15. The respondent argued that it had fully supported Mr. Samra throughout the processing of the grievance and relied on the *Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union* case, [1975] OLRB Rep. 444, in support of its contention that it had not acted in a manner that was arbitrary, discriminatory or in bad faith within the meaning of section 60 in the representation of Mr. Samra. The respondent adopted the position that in order for the complainant to succeed it was necessary to establish that it had acted recklessly in representing Mr. Samra. The respondent pointed to the fact that Mr. O'Keeffe was not a full-time official and referred to the *Ford Motor Company Limited* case, [1973] OLRB Rep. 519. The respondent argued that section 37(5a) of the Act had no application because this complaint did not involve an extension of time but rather involved the withdrawal of a grievance. The respondent also pointed out that in the normal course of events the grievance could not be revived unless the intervener consented. Mr. O'Keeffe's failure to attempt to revive the grievance was explained on the basis of the past conduct of the intervener in refusing to revive grievances. The respondent viewed the circumstances as unfortunate, characterized Mr. Samra as being the author of his own misfortune and argued that the complaint be dismissed. The Board agrees with the respondent's contention with respect to section 37(5a) of the Act.

16. The intervener agreed with the respondent's position and pointed out that if the grievance was referred to arbitration it would be prejudiced. In this regard the intervener asserted that the foreman who was involved in the incident with Mr. Samra had subsequently been discharged and that its representative who was largely involved in processing the grievance, Mr. Peter Doucette, had died in July of this year. The intervener emphasized that it was entitled to rely on the respondent's withdrawal of Mr. Samra's grievance.

17. The complaint has its origin in a breakdown in communication between the respondent and Mr. Samra. The respondent had the responsibility to process the grievance to



arbitration and had informed Mr. Samra of the time it would take. Mr. O'Keeffe and Mr. Samra had different recollections of Mr. O'Keeffe's estimate of how long it would take to resolve the matter. Mr. O'Keeffe testified that he mentioned a period of two months while Mr. Samra gave evidence that the period mentioned was three to four months. There was basic agreement on much of the testimony. However, where there is a difference between the evidence of Mr. Samra and Mr. O'Keeffe, the Board accepts the evidence of Mr. Samra. While Mr. O'Keeffe gave his evidence in a forthright manner, there was a vagueness or a lack of recollection with respect to the time period and also with respect to the telephone number he called trying to contact Mr. Samra and to the names of the two East Indians he spoke to about Mr. Samra's return.

18. Mr. O'Keeffe withdrew the grievance during the period of three to four months. In these circumstances it is not surprising that Mr. Samra did not contact the respondent about a delay in returning to Canada. His passive behaviour in waiting to be contacted by the respondent is reasonable conduct in the circumstances of this complaint. Having regard to the fact that the respondent had the responsibility to process the grievance, it was the duty of the respondent to contact Mr. Samra about any change in circumstances with respect to his grievance.

19. Mr. O'Keeffe, without a shred of evidence, acted upon an assumption that Mr. Samra had decided to remain in India. An unanswered telephone call and questioning two East Indians about Mr. Samra's whereabouts do not form a logical basis for concluding that Mr. Samra had decided not to return to Canada. Before determining to extinguish Mr. Samra's rights under the collective agreement, the respondent was under a clear duty to make reasonable efforts to contact Mr. Samra. The efforts made by Mr. O'Keeffe were not reasonable in the light of the assurances given to Mr. Samra with respect to the period of time before the matter would be resolved.

20. In the *Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union* case, *supra*, the Board canvassed the extent of the duty of fair representation under section 60 and in discussing the parameters of arbitrary representation stated at page 464:

“On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances – errors consistent with a ‘not caring’ attitude – must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection.”

The respondent's conduct through its president, Mr. O'Keeffe, was perfunctory in with-

drawing Mr. Samra's grievance and constituted a "not caring" attitude which was inconsistent with the duty of fair representation. Such conduct is arbitrary within the meaning of section 60 of the Act. In reaching this conclusion the Board has taken into consideration the fact that Mr. O'Keeffe was merely a part-time president of the respondent. See the *Ford Motor Company of Canada Limited* case, *supra*. It should be remembered that Mr. O'Keeffe was not called upon to make a snap decision and that he had the services of his union's international representative available to him before the decision to withdraw was made and communicated to the intervener. The fact that Mr. Samra was a shop steward in the past does not, in the circumstances of this complaint, relieve the respondent from its duty to make reasonable inquiries about Mr. Samra's whereabouts and intentions. The evidence demonstrates that Mr. Samra relied on the assurances of Mr. O'Keeffe with respect to the time available before his grievance would be resolved. Indeed, Mr. Samra's conduct is entirely consistent with this. He directed his inquiries to his brother and through his brother to his landlord and asked if they had heard anything about his grievance from the intervener and not the respondent. Clearly he relied on Mr. O'Keeffe's assurances.

21. It is unfortunate that the intervener finds himself in a position where one witness is no longer in its employ and another witness has died. However, the respondent's conduct does not affect Mr. Samra's rights. The intervener's position is no different from a situation where in an arbitration proceeding one of a trade union's witnesses had been promoted, or moved out of Ontario or died.

22. The Board finds that the respondent's conduct with respect to Mr. Samra's grievance was arbitrary within the meaning of section 60 of *The Labour Relations Act*. Section 79(4) of the Act sets forth the remedies which the Board may provide for such a violation of section 60. Pursuant to section 79(4) the Board directs the respondent and the intervener to process Mr. Samra's grievance to arbitration.

23. In the event that a board of arbitration determines that compensation is to be paid to Mr. Samra, some of the compensation may be referable to delay which has been occasioned by the respondent's violation of section 60 of the Act. The Board remains seized of this complaint and will entertain representations with respect to the amount of compensation, if any, which is to be borne by the respondent.

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**0804-79-R** Labourers' International Union of North America, Local 837, Applicant, v. **Dynamic Circuits Corporation Limited** and/or 418514 Ontario Limited, carrying on business as Proto Circuits, Respondents, v. Group of Employees, Objectors.

**Certification – Petition – Representation Vote – Objectors failing to appear – Employer seeking representation vote based on petition and small margin of union majority – Board refusing to order vote.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members W. G. Donnelly and B. F. Lee.

**APPEARANCES:** *S. B. D. Wahl and S. DeLuca for the applicant; H. Turkstra and V. Valeri for the respondents; none for the objectors.*

**DECISION OF THE BOARD;** September 4, 1979.

1. This is an application for certification in which the applicant seeks a declaration under section 1(4) of the Act that the named respondents constitute a single employer for the purposes of the Act. The applicant also requests the Board to exercise its discretion in accordance with section 7a of the Act and certify the applicant without a vote.
2. The correct names of the respondents are "Dynamic Circuits Corporation Limited" and "418514 Ontario Limited, carrying on business as Proto Circuits" and the style of cause is hereby amended accordingly.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
4. Both respondents and the applicant agreed on the description of the bargaining unit that should be found appropriate, subject only to the determination by the Board under section 1(4) of the Act as to whether the named respondents are to be treated as a single employer for the purposes of the Act.
5. The respondent, Dynamic Circuits, filed with the Board schedules of employees containing the names of seventeen (17) persons who would fall within the described bargaining unit. The respondent, 418514 Ontario Limited filed with the Board required schedules indicating no persons within its employ as falling within the described unit.
6. The applicant filed with the Board, on behalf of 13 persons, documentary evidence of individual membership in the applicant which satisfied the statutory requirements of section 1(1)(j) of the Act. The Board has satisfied itself that 10 of such applications for membership are in respect to persons who are listed as employees by the respondent, Dynamic Circuits, and that therefore more than 55% of the employees listed in the bargaining unit are members of the applicant.
7. An undated handwritten statement of desire was filed with the Board as of August 8th, 1979 the terminal date for this application, containing the signature of 11 persons who



are employees of Dynamic Circuits. The handwritten statement bears the following heading:

“Labourers’ International Union of North America, Local 837. To Whom It May Concern: The following employees do not wish to have a union in Dynamic Circuits: –”

followed by eleven signatures.

8. None of the persons whose signatures appear on the handwritten statement of desire appeared in person or by representative at the hearing held by the Board. No evidence was therefore adduced as to the circumstances concerning the origination of the statement of desire or the manner in which each signature was obtained, as is required by Board Rule 48(5). The Board therefore concluded that no weight could be attached to the handwritten statement of desire filed with it.

9. Counsel for the respondents argued that since the notice of hearing is served on employees affected through the posting of the Board’s Form 5 in the place of work, and that such form (in the instant case) consisted of three separate sheets, and that paragraph 9 thereof which gives notice of date, time and place of hearing appears on the last sheet, that an inference could be drawn that notice of hearing had not in fact come to employees’ attention. Counsel suggested that under the circumstances the Board should require one of its Labour Relations Officers to endeavor to contact by phone the employees concerned in the statement of desire and make enquiry as to whether the failure to appear was one of conscious intent or of inadvertence.

10. Counsel for the respondent also argued that the Board should exercise its discretion under section 7(2) of the Act by directing a representation vote. In support of this position counsel argued that the evidence of membership was barely in excess of 55% (actually 58.8%), and that the handwritten statement of desire by 11 employees should be interpreted as an indication of possible defection from the applicant’s support, both coupled with the possibility that, as discussed above, the employees may not have had adequate notice of hearing.

11. The Board, after consideration of the representations, ruled at the hearing that the posting of Board Form 5, which is headed “Notice to Employees of Application for Certification and of Hearing before The Ontario Labour Relations Board” was proper and effective servicing of notice on the employees affected. The Board further ruled that the non-appearance of parties properly served is the sole responsibility and/or choice of the parties and it is not a part of the Board’s function to canvass non-appearing parties as to their reasons for such non-appearance. The Board does note that the Board Form 47, entitled “Return of Posting” was executed on August 8, 1979, by the President of Dynamic Circuits and by the Secretary Treasurer of Proto Circuits, declaring in each case that Form 5 had been posted on the respondents’ premises as of 2:00 p.m. August 3rd, 1979.

12. The Board also ruled at the hearing that in the absence of evidence relating to the origination and circulation of the written statement of desire no weight could be attached to it. It was therefore the Board’s opinion that under the circumstances this was not a case in which it would be appropriate for the Board to exercise its discretion by ordering a repre-

sensation vote. Consequently, it was not necessary for the Board to receive evidence or entertain representations as to the applicability of section 7a of the Act.

13. Following a recess the Board indicated it intended to proceed to consider the question as to whether the respondents should be treated as a single employer for purposes of the Act. Counsel for the respondents informed the Board that during the recess he had received instructions from his clients to make application for judicial review of the Board's rulings on the grounds that the Board had both declined to exercise jurisdiction and had exceeded its jurisdiction. Counsel stated that in the face of his instructions he considered that he could not continue to participate in the proceedings without prejudicing the imminent application for judicial review and therefore sought permission to withdraw from the proceedings. Counsel in view of his position elected not to participate in the proceedings by adducing evidence as required by section 1(5) of the Act. Counsel conceded without prejudice to the respondents' rights to proceed as outlined by way of judicial review that the respondents were carrying on related activities or businesses through corporations under common control or direction, and that there were no shareholders of either corporation other than the directors.

14. The applicant filed with the Board a Certificate of Incorporation issued by the Ministry of Consumer and Commercial Relations establishing that 418514 Ontario Limited came into existence on July 11, 1979 and that, amongst its corporate objectives, is one "To manufacture printed circuit boards, electronic components and other electrical devices". The first directors of this corporation are certified to be Ferdinand Stocker and Vincenzo Valeri. The applicant also filed a copy of the annual return, as of February 27, 1976, of Dynamic Circuits Corporation Limited, in which general undertaking of that corporation is described as "manufacturing printed circuit boards" and the directors of which corporation are recorded as being V. Valeri and F. Stocker. Both corporations, in replies filed with the Board indicate a common business address.

15. In the opinion of the Board the respondents are carrying on associated or related activities or businesses under common control and direction and the Board declares that they are to be treated as constituting one employer for the purposes of *The Labour Relations Act*.

16. The Board further finds that all employees of the respondents, employed in the City of Hamilton, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons employed for less than twenty four hours per week and students employed during the school vacation period constitute a unit of employees of the respondents appropriate for collective bargaining

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18. A certificate will issue to the applicant.

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**0346-79-R** Mrs. Carol Killman; Mrs. Rosemary LaForme, Applicants, v. Canadian Union of Public Employees, Respondent, v. **Groves Park Lodge**, Intervener.

**Petition – Termination – Custody of petition significant – Employer involvement in earlier petition tainting termination application.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members W. F. Rutherford and J. D. Bell.

**APPEARANCES:** *Jacques A. Emond, Rosemary LaForme and Carol Ann Killman for the applicant; S. R. Hennessy, Sim Woodward and L. Delarge for the respondent and Walter T. Langley and William Viveen for the intervener.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; September 24, 1979**

1. The applicants have applied to The Labour Relations Board under section 49 of the Act for a declaration that the respondent union no longer represents the employees in the bargaining unit for which it is the bargaining agent.
2. The parties agree that the application is timely.
3. Having regard to all the evidence the Board is satisfied that if the statement of desire filed with the Board in support of this application for termination is voluntary it would signify that not less than forty-five per cent of the employees in the bargaining unit have voluntarily indicated in writing that they no longer wish to be represented by the trade union and would cause the Board to direct that a representation vote be taken.
4. The outstanding issue, therefore, is whether or not the petition filed in support of this application for termination reflects the wishes of the employees, voluntarily expressed. The onus is upon those seeking to rely on the statement of desire to satisfy the Board that it is a voluntary expression. The Board's Rules require the applicants to provide first-hand evidence of the origination, preparation and circulation of the document. In evaluating the voluntariness of a petition, the Board is particularly sensitive to indications that the employer or his representatives have been involved with any phase of the petition. The Board has repeatedly underscored the responsive nature of the employer/employee relationship and the particular vulnerability of employees to influences that might be brought to bear on them by management. The Board is mindful of the adverse effect that management influences can have on the ability of an employee to freely express whether or not he wishes to be represented by a trade union.
5. In the instant case, Rosemary LaForme, a nurses' aide, and Carol Killman, a kitchen attendant, testified as to the origination, preparation and circulation of the petition. Although both circulated the petition it is clear that LaForme played the dominant role. The petition was circulated on the employer's premises. LaForme and Killman testified, however, that all signatures were obtained outside of working hours, i.e. before or after shifts, during breaks, or during the supper hours, and that none were obtained within the sight or knowledge of anyone from management. The witnesses further testified that neither Mr.



nor Mrs. William Viveen, the owners of the Lodge, nor any other member of management was in any way involved with this petition.

6. A substantial number of significant conflicts flow from the testimony given by the various witnesses. In many instances the testimony given on behalf of the applicants and the Lodge was in direct conflict with the evidence of the respondent union. The Board has carefully reviewed all of the testimony presented and has assessed the credibility of the respective witnesses having regard to such factors as the consistency of the evidence, its probability in view of the rest of the evidence, the firmness of the witness's memory, his opportunity and capacity to observe as well as his demeanor in the witness box.

7. Based on its evaluation of credibility and in view of all the evidence, the Board accepts that the following events took place: prior to the collection of all the signatures of the petition, certainly the last two and possibly others, the petition was left unattended on the counter of the medication room. On April 24, 1979 an employee was approached to sign the petition during her working hours. As well, shortly after she signed the petition, LaForme told her that it was a good thing she had signed because if she hadn't the full-time employees would be fired. At a meeting of non-union supporters on May 7th, LaForme, the primary spokesman at the meeting, told the gathering that she knew Mr. Viveen and his ways and that if they didn't go along with him he would make it hard on them and make them want to quit their jobs. As well, the Board accepts the evidence that Mr. Viveen was deeply involved in all aspects of a termination application and attendant petition which was circulated approximately a year before the instant petition. It was admitted by LaForme that she helped circulate the first petition. The Board further accepts the evidence that Viveen suggested LaForme's name to the prime mover of the first petition as someone who would be willing to help.

8. In evaluating a petition, the Board places considerable weight on the custody of the petition. As stated in *J.A.K. Electrical Contractors Limited*, [1977] OLRB Rep. May 275 at p. 276 if the custody of a petition cannot be substantially verified during its period of circulation the Board will not attach any weight to it. The custody of the petition in this case is particularly important as it was circulated on company premises and is brought into serious question by the fact that the petition was found unattended on the counter of the locked medication room, a room to which Mr. and Mrs. Viveen and the Director of Nursing, who is not in the bargaining unit, have keys.

9. Regarding Viveen's involvement in the first petition, the Board does not draw the conclusion that simply because he was instrumental in the origination and circulation of the first petition he was similarly involved in the second. His participation in the first petition concerns the Board, however, because of the carry-over effect that may reasonably have existed in the minds of employees when the instant petition was circulated just one year later, particularly where it was circulated on the premises of the Lodge by the same person who helped circulate the previous petition. The potential for a carry-over effect in the minds of employees is further heightened by the small size of the Lodge and the daily presence of the Viveens who are admitted to be active administrators.

10. There was uncontradicted evidence from a number of witnesses that LaForme spent a great deal of time in the Viveens' office and that she was particularly friendly with them. The Board accepts that LaForme's duties as the nurse in charge of the afternoon shift

would necessitate frequent discussions of a business nature with the Viveens. The Board draws from all the evidence, however, that LaForme was reasonably perceived by employees as having a relationship with the Viveens that extended beyond that which usually exists between the ordinary employer and employee. The closeness of their association was affirmed by LaForme's own statement at the May 7th meeting that she knew Viveen and his ways and is further substantiated by the evidence that Viveen suggested LaForme as someone who would be willing to help in the circulation of the first petition. In view of these circumstances, the Board concludes that employees attending the May 7th meeting would reasonably have believed that LaForme was privy to threats made by Viveen when she stated that if they didn't go along with him he would make them want to quit their jobs. The inhibiting effect that this situation could have on an employee's ability to freely express himself on a petition is particularly significant in view of the fact that two signatures were obtained after the May 7th meeting. Similar concerns are also raised by LaForme's statement to another employee that it was a good thing she signed because if she hadn't full-time employees would be fired.

11. For the reasons set out above, the Board is satisfied that the atmosphere prevailing at the Lodge at the time the petition was circulated was sufficiently tainted by fear of managerial influences to prevent employees from freely exercising their right to state through a petition whether or not they wanted to be represented by the respondent trade union. The applicants in this case have not met the onus that rests upon them. Accordingly, the application is dismissed.

#### **DECISION OF BOARD MEMBER, J. D. BELL:**

1. The applicants in this case have presented to the Board a petition signed by more than forty-five per cent of the employees. This raises a question as to whether or not they want to continue to be represented by this trade union.

2. In my opinion, this question of representation, rather than being dismissed out of hand, should be settled by a secret ballot vote conducted by the Board which will give each employee the opportunity to freely express his or her wishes.

3. The dismissal of this application leaves the question of representation unanswered.

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**0899-79-U Martin Stewart Contracting Limited, Applicant, v. Royce Arnold, Respondent, v. Christian Labour Association of Canada, Intervener.**

**Natural Justice – Strike – Cease and Desist application naming business agent of one local – Inadvertently addressed to another local – Board finding named respondent receiving adequate notice – Employees not crossing picket lines – Cease and desist order issuing**

**BEFORE:** E. Norris Davis, Vice-Chairman.

**DECISION OF THE BOARD;** September 11, 1979

1. The applicant is the general contractor building a new High School scheduled for May 1980 completion for the Halton Separate School Board. At the times relevant to this application there were sub-contractors identified as Reinhardt Masonary, Marcotte Mechanical Ltd., and Schaible Electric Ltd. as well as a sub-contractor of Marcotte known as J & J Backhoe Services, working on the job site. The applicant is party to collective agreements with Labourers International Union, Local 837 and the Carpenters Local 18 and members of those unions were then at work on the site. Additionally employees of Reinhardt, Marcotte and Schaible were then working. All persons working were covered by collective agreements extending to April 30, 1980, and in the case of Schaible Electric the collective agreement was with CTUC Local 6 which union it is claimed has merged or amalgamated with CLAC.

2. On Friday, August 10th, 1979, 2 pickets appeared at the gate of the applicant's job site, and Ronald Martin, President of the applicant, spoke to one of the pickets who told him the picket line had to do with an unfair electrical contractor. Martin states that the picket identified himself as a member of IBEW Local 105, but refused to supply his name. The picket line did not result in any interruption of work on that day.

3. On Monday, August 13, 1979, a picket line of 10-12 persons appeared at the job site bearing signs "Project unfair to AFL-CIO Unions" and "Stop Company Run Unions". Fred Reaume, Director of Industrial Relations for the General Contracting Association of Hamilton testified that he attended the site at 8:15 a.m., August 13, 1979, and spoke with two persons on the picket line as to the reasons for the picket, one of whom stated that there was a Christian Trade Union contractor on the job site and that the work belonged to AFL-CIO unions. The other person said it was because of the possibility of a non-union sheet metal contractor being on the job, and that he was opposed to anything but AFL-CIO unions. Reaume and Martin, President of the applicant, also talked with a person who identified himself as Roy Arnold of IBEW Local 105 and a person who identified himself as John (the surname not being heard by the witness) but who, at the time of the hearing was conceded not to be John Fletcher who had been named as a respondent but was a John Belinda, Business Agent of the Sheet Metal Workers Union. Reaume testified that in the conversation with Arnold and Belinda, they stated the picket line was because of the presence on the job site of Schaible Electric which was not an AFL-CIO union company. Reaume also testified that they stated they were complaining about CLAC and that they belonged to Local 105 IBEW, and further that they would continue to picket in order to let the contractors know that in the future they should use AFL contractors. Arnold and Belinda stated that



they recognized the applicant would secure a cease and desist order but at least it would let their members know they had tried to get the work for them. Reaume further testified that he had been at the job site daily since August 13th and on all occasions (including the day of the hearing) the picket line was in evidence, and that in conversations with persons on the picket line they invariably identified themselves as members of Local 105, IBEW, and that every other day there were picketers who identified themselves as members of the Sheet Metal Workers Union.

4. Ronald Martin, President of the applicant, corroborated Reaume's version of the conversation with Arnold and Belinda. Martin also testified that Arnold had suggested to him that if Schaible's men came down to the union hall, they would immediately get cards. Martin testified that on Monday, August 13th persons employed as plumbers entered the job site but would not go to work, employees of J & J Backhoe worked for 1 to 1½ hours, and that members of the Bricklayers, Carpenters and Labourers Union did not enter the job site. Employees of Schaible Electric worked on August 13th and all succeeding days and no other persons employed on the site worked on those days.

5. Kurt Schaible, President of Schaible Electric testified that he had commenced work on the job site June 25 or 26th with two electricians, and that Schaible Electric has a collective agreement with CTUC Local 6 which is in effect until April 30, 1980 and that his company has never had any collective bargaining relationship with Local 105, IBEW.

6. Schaible testified that he talked with a person on August 13th who identified himself as Roy Arnold and that in response to Schaible's question to Arnold as to the purpose of the picket line, Arnold responded, "You are not affiliated with the Labour Council and belong to the Christian Trade Union of Canada" and also that "if I tell my guys on the job to go to the Union Hall with him they would get a ticket from the International Union and our troubles are over".

7. Peter Van Duyvenvoorde testified that on Tuesday, August 14 that present on the picket line was a person who identified himself as Jerry O'Connor, Asst. Business Agent of the IBEW. This was corroborated by Ed Vanderkloch who also testified that he asked O'Connor if the picketing was against the General Contractor and received the response that it was against Schaible and the Christian Trade Union. Vanderkloch then asked what was wrong with the Christian Union and O'Connor replied that it did not belong to the International.

8. The Board received a letter dated August 15, 1979 from the solicitor for Local Union 105 of the International Brotherhood of Electrical Workers and for Local 537 of the Sheet Metal Workers stating,

"The above-mentioned notice of application has been referred to the writer on behalf of Local Union 105 of the International Brotherhood of Electrical Workers and Local 537 of the Sheet Metal Workers.

We have perused the application and must advise the Board that there are no such business agents or representatives of the unions involved such as are named in the application.

Furthermore, Local 107 is a local of the International Brotherhood of Electrical Workers located in Grand Rapids, Michigan.

Accordingly, I have advised my client that it was not necessary for it to attend at the hearing before the Board in that a cease and desist order, if made, would not apply to any persons known to us and representing the unions involved."

9. The applicant notified the Board by letter dated August 14th (copy of which was forwarded to Ray Arnold by the Board on August 15th) that the name of the respondent should be changed from "Ray Arnold" to "Royce Arnold".

10. The particulars which accompanied the application and which were served on Ray Arnold contained details of occurrences on which the applicant intended to rely which were within the knowledge of Royce Arnold and, in themselves should have caused him to at least enter a limited appearance. These documents were addressed by the Board to Ray Arnold, International Brotherhood of Electrical Workers Local 107, 200 Fennell Avenue, Hamilton, Ontario. Despite the error in description of Royce Arnold as "Ray Arnold" and the error of addressing to IBEW Local 107 it is evident from the solicitor's letter of August 15th that the letter was received in the offices of Local 105, IBEW, opened, and it can be reasonably inferred its contents were known to Royce Arnold. The Board is satisfied that Royce Arnold had, in fact, adequate notice of these proceedings.

11. The evidence respecting Arnold's conversations with Reaume, Martin and Schaible identify him as an agent of Local 105, IBEW. Testimony of several witnesses was to the effect that daily there were persons on the picket line, and Schaible's evidence of his conversation with Arnold relative to having his employees join the IBEW and "his troubles would be over," all lead to a conclusion that Arnold fully identified himself with the picket line. The evidence also was that a large number of employees of the applicant declined to work from August 13th onwards such as justifies a Board inference that the refusal to work was a concerted activity, and that such concerted activity flowed from the establishment of the picket line which had as its purpose the forcing of Schaible employees into membership in the IBEW. It is our finding that the respondent did procure or encourage an unlawful strike.

12. The facts of the instant case fall within the rationale of the *Wheelabrator Corporation of Canada Limited* case [1974] OLRB Rep. July 490. In the Board's view the principles enunciated in that case are applicable to the facts of this case. Hence the Board issued a direction ordering the respondent, his agents, representatives and all other persons acting for or on his behalf to refrain from:

- 1) picketing, watching or besetting or attempting to picket, watch or beset at or adjacent to the job site of Martin Stewart Contracting Limited known as the Burlington Assumption High School;
- 2) procuring, counselling, supporting or encouraging an unlawful strike of employees of sub-contractors of Martin Stewart Contracting Limited at its job site known as the Burlington Assumption High School;

- 3) ordering, aiding, abetting, counselling, performing or encouraging in any manner whatsoever with directly or indirectly any persons to commit the acts aforementioned.
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**1124-77-M; 1125-77-M; 1126-77-M; 1127-77-M; 1128-77-M; 1129-77-M;** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant), v. **The Master Insulators' Association of Ontario, Incorporated;** B. & D Insulation Ltd.; Commercial & Industrial Insulations Limited; Mooretown Insulation Contractors Ltd.; Canadian B & D Insulation Ltd.; A.C. & S. Contracting Ltd.; Lewis Insulation Services Ltd., (Respondents).

Arbitration – Section 112a – Union claiming travel allowance – Employers and Union waiving payment – Union estopped from making claim – Union referring out-of-town members to Employers – Employers hiring referrals – Whether subsistence allowances payable

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members D. B. Archer and W. H. Wrightman.

**APPEARANCES:** *S. B. D. Wahl and J. Duffy for the applicant; R. A. Werry and Geo. Grossman for The Master Insulators' Association of Ontario; B. W. Binning for the other respondents.*

**DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN;** September 10, 1979

1. Each of the above noted matters is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*. These matters are hereby consolidated pursuant to the Board's Rules of Procedure.

2. Each of the respondent employers, with the exception of Canadian B & D Insulation Ltd., is a member of the Master Insulators' Association of Ontario Incorporated, and as such was at all relevant times bound to a collective agreement between the association and International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 ("Local 95"). Local 95 is a province-wide local with offices in Toronto. Canadian B & D Insulation Ltd. at all relevant times was bound by a separate agreement with Local 95 which incorporated by reference the terms of the agreement between the Local and the Master Insulators' Association.

3. The grievances before the Board allege that the respondent employers failed to pay travelling expense allowances to certain employees working on projects in the Sarnia area, and also that they failed to pay other employees board and living allowances. The grievances also allege that the respondents failed when required to replace certain "emergency help" with members of the Local.



4. In 1976 and 1977 there was a great amount of new construction work being performed in the Sarnia area. The owner-clients of the major projects in the area took the position that no board or living allowances should be paid in the area, and with certain fairly limited exceptions they were not paid. The issue before the Board in these proceedings is not the correctness or fairness of the general stance taken by the owner-clients, but rather whether any of the respondent employers failed to pay board or living allowances in circumstances where they were required to do so under the terms of the collective agreement.

5. It should be noted at the outset that counsel for both the Master Insulators' Association and the respondent employers acknowledged that when an employer instructed an individual already in its employ to report to a job location which required him to reside away from home, be it in Sarnia or elsewhere, the individual was entitled to receive a board and living allowance. On several occasions one of the respondent employers instructed employees working for it in Windsor to report to the Sarnia area, and when they did so they were paid the appropriate allowances. The position of Local 95 is that individuals referred to job sites in Sarnia by Local 95 should also have received the allowances, a proposition with which the respondents disagree.

6. These differing views as to the circumstances under which the employers were required to pay board and living allowances were discussed at a meeting of the employers and Local 95 on May 11, 1976, without either side being willing to alter its position. The result of the dispute was that the union referred only Sarnia area residents to the various job sites, notwithstanding the fact that there were not sufficient local residents to meet the employer's requests for men, and that certain members of Local 95 residing outside the Sarnia area were unemployed.

7. At some point near the middle of October 1976, the general province-wide demand for insulators had reached the point that there were no unemployed members of Local 95 anywhere in the province. At that time the various employers declared an "emergency" and began to hire "emergency help" pursuant to Articles 2.04 and 2.05 of the collective agreement, which state as follows:

"2.04 The employers shall have the right to procure workmen from available sources other than from the Union on jobs located within the local jurisdiction when the Union has failed to furnish the required number of competent and qualified employees within two (2) working days following a written request by an employer. Immediately upon hiring, such workmen shall be considered to be emergency help. The employer, after consultation with the Union Business Manager, shall designate the classification within which such emergency falls, and they shall be entitled to receive hourly rates of pay applicable to such classification. Emergency help shall be issued referral cards for identification and classification only, but shall not come within the scope of this Agreement except as noted in Clause 9.01, and shall be replaced as soon as competent Union employees are available. Emergency help shall not be counted in the ratio for the duration of the emergency.

2.05 An emergency shall be defined as, and shall be deemed to exist, where there is a job situation in which the Union is unable to provide

qualified members of the Union on a written request by an employer. If there is any disagreement between the parties concerned as to whether or not an emergency does or does not exist, Article 6 (i.e. the grievance – arbitration procedure) will apply.”

8. As indicated by the above quoted provisions of the collective agreement, the emergency men hired by the employers did not belong to Local 95. Apparently a number of them were members of other crafts, such as bricklayers and carpenters. There is no dispute but that the employers were entitled at the time to declare an emergency and indeed as required by Article 2.04 Local 95 issued each of them a referral card.

9. Notwithstanding the use of emergency men, the respondent employers found themselves short of qualified manpower to complete their contracts. This in turn resulted in fears that the owner-clients on some of the projects might re-evaluate their need for insulation work, or consider postponing certain of the work indefinitely. Another possibility discussed, and one which clearly concerned the Union, was that the owner-clients might assign some of the work being performed by insulators to contractors employing sheet metal workers. In addition, some of the members of the Local had become unemployed and were indicating to the union that they would like to work in Sarnia where there was a manpower shortage. All of these considerations led to a meeting being held on or about October 18, 1976 between representatives of the respondent employers and representatives of Local 95. The meeting produced agreement on a number of points. Two of the employer representatives at the meeting later wrote to Mr. D. McIntyre, the union's business manager, to set out their understanding of the agreement insofar as it affected their companies. The oral evidence is that the two letters reflect the actual agreement of the parties. The first letter, dated October 20, 1976, was from Mr. J. Beernink, the Vice-President of Canadian B & D Insulation Ltd., and reads as follows:

“This is to confirm our discussion with yourself and Internationa [sic] Vice-President, Alf Kirton, regarding the shortage of qualified insulation mechanics for the Lambton County area. As you are aware, we, the insulation contractors, are in part governed by the area practice of no payment for room and board.

In order to preserve our insulation industry as we know it to-day we have mutually agreed to the following compromise.

Local 95 will do their utmost to recruit experienced insulation workers as travellers from other Heat and Frost Insulators and Asbestos Workers locals and send them to Sarnia without room and board allowance.

Local 95 will also assist and allow the hiring of local people as temporary helpers, who will not be counted in the ratio.

Canadian B & D Insulation agrees to pay a three dollar a day travel allowance, as per Sarnia area agreements, to all insulators, including temporary helpers, working on the Petrosar Project. This payment will commence October 18, 1976.

The above conditions will apply until completion of the Petrosar Project, Corunna, Ontario.

Please Note: – This is not intended and is not to be taken as a revised, or altered Collective Agreement, nor is it intended to set a precedence. [sic]”

The second letter, dated October 22, 1976, was from Mr. G. F. Moore, the Manager of A.C. and S. Contracting Ltd., and states as follows:

With regards to the above subject, we would like to confirm our understanding of discussions with yourself and International Vice-President Mr. A. Kirton as follows: –

- (A) Local 95 will attempt to get us qualified travelers [sic] and send them to Sarnia for our Company without room and board allowance.
- (B) Local 95 will allow AC and S Contracting, to hire local people as temporary helpers who will not count on ratio.
- (C) AC and S Contracting agrees to pay to each Local 95 man on Lummus project only, an allowance for daily travel of \$3.00 per day; said payments to commence October 18, 1976.
- (D) These payments would be paid weekly for the duration of the Petrosar project for the new construction portion of the work only.
- (E) This is not intended to, and is not to be taken as a revision or alteration, of the present collective agreement, nor is it intended in any way, to set a precedent for any future work beyond the present time allotment as set out above.
- (F) Said payments would cease if any of the above is changed or altered.”

10. As the above letters indicate, Local 95 agreed to recruit “travellers” and send them to Sarnia without board and living allowances. Travellers are members of other locals of the International Association of Heat and Frost Insulators and Asbestos Workers. Local 95 did in fact refer a number of travellers from other provinces and the United States to employers in Sarnia. None of the travellers received board and living allowance, and the union is not now claiming that they should have.

11. At the October 18th meeting it was agreed that the employers would pay all members of Local 95 working on the large Petrosar project (also referred to as the Lummus project) a \$3.00 travel allowance per day. Following the meeting the union began to refer large numbers of its members to employers engaged on the Petrosar project, and they, as well as insulators already working on the project, were each paid \$3.00 per day as a travel allowance, no matter whether they were living close to the project or commuted in daily from



Windsor or London. We are satisfied that by agreeing to this \$3.00 travel allowance for all employees on the project, Local 95 was also agreeing that no employee need be paid more than the \$3.00, notwithstanding that the collective agreement might provide to the contrary.

12. At the hearing it was contended by counsel for the respondent employers that as part of the exchange for the \$3.00 travel payment, Local 95 gave up the right of its members to receive board and living allowances, and accordingly, it was now estopped from claiming any such allowances. It is clear that at least some of the respondent employers felt that this was part of the agreement. It is equally clear, however, that the union never accepted the contention that it had waived board and living allowances for its members.

11. It is now an accepted principle that if a union undertakes to an employer that it will not be insisting upon strict compliance with a provision in a collective agreement, and the employer takes some step in reliance upon that undertaking which puts it in violation of the agreement, the union is estopped from claiming damages as a result of the violation. See: *International Union of Operating Engineers & Ben Ginter Const. Co. Ltd.* 67 CLLC ¶14,032 (B. C. Sup. Ct.) However, it is also accepted that this principle should be applied only where a union has clearly indicated to the employer that it will not be insisting on strict compliance with the terms of the collective agreement. Although the evidence before us does clearly establish an agreement that board and living allowances need not be paid to travellers, we are not satisfied that either the viva voce evidence or the letters quoted above go so far as to establish that the union also agreed that board and living allowances need not be paid to Local 95 members.

14. As already indicated, following the meeting on October 18, 1976, Local 95 referred large numbers of its members who were not normally residents in Sarnia, to the various respondent employers to work on job sites in the Sarnia area. None of these members received board and living allowances. Some of the members referred by the union declined to take the work when informed that they would not be receiving board and living allowances.

15. This situation continued unchanged until June of 1977. On or about June 1, 1977 Mr. J. Duffy became business manager of Local 95. One of Mr. Duffy's first acts as business manager was to travel to Sarnia with three unemployed members of the Local, and visit the local offices of each of the respondent employers. At each of the offices he asked that the company hire the three unemployed tradesmen. In every case the company expressly agreed to hire the men, but noted that they would not be paid any board and living allowance. Each of the three men refused to accept employment under those terms. Mr. Duffy, in turn, asked the employers to terminate their emergency men on the basis that there were unemployed members of Local 95 available, a request which each of the employers refused.

16. It is the contention of Local 95 that when it referred out of town members to jobs in the Sarnia area, and the members resided in Sarnia, the members were entitled under the collective agreement to receive either board and accommodation at their employer's expense, or receive a board and living allowance, and that the failure of the employers to provide either these amounted to a violation of Article 10.02 of the collective agreement. Article 10.02 states, in part, as follows:

“When instructed by the employer to report to a job location which re-

quires his employee to reside away from home and which is over 50 miles radius, referred to in Clause 10.01, the employee shall be entitled to be provided with suitable board and living accommodation. The employer shall either provide such board and accommodation at his own expense or shall reimburse the employee for board and living accommodation up to the sum of \$15.00 per working day. May 1, 1976: \$16.00 per working day. May 1, 1977: \$18.00 per working day. May 1, 1978: \$18.00 per working day.”

17. Central to this matter is the meaning to be given to that portion of Article 10.02 which indicates that board and living allowances need be paid to an employee who is “instructed by the employer to report to a job location which requires his employee to reside away from home ...”. It was the contention of counsel for Local 95 that this phrase encompassed employees referred to a job location by the union which required the employees to reside away from home. To support this interpretation he relied on certain evidence relating to the past practice of the respondent employers and certain other members of the Master Insulators’ Association.

18. It is now well established that evidence of past practice can only be relied on as an aid in interpreting a collective agreement if the relevant provision of the agreement is ambiguous and the evidence of past practice sufficiently strong to establish that the parties themselves have attributed a particular meaning to the ambiguous provision. See: *John Bertram & Sons Co. Ltd.*, (1967) 18 L.A.C. 362 (Weiler). Counsel for the union contended that either Article 10.02 was ambiguous on its face or that the evidence of past practice would demonstrate the existence of a latent ambiguity. We are not satisfied, however, the evidence of past practice assists the union. Most of the instances referred to where Local 95 members received board and living allowances involved situations where employees had been directed by their existing employer to report to the job site. Further, the overwhelming past practice of the respondent employers has been not to pay board and living allowances to employees referred to a job site by the union.

19. In assessing the wording of Article 10.02, we are satisfied that the requirement for board and living allowances contained in the phrase “when instructed by the employer to report to a job location which requires his employee to reside away from home ...” refers only to employees instructed by an employer to go to the job location and that it cannot reasonably be interpreted to include union members who travel to such a job location on the basis of a referral issued by the local.

20. In reaching this conclusion we have considered, but not accepted, the contention of Local 95 that the employers through the collective agreement have delegated to the union the right to hire employees on their behalf, and that when the union referred a member to a job in Sarnia, the member was already an employee of the employer and was being instructed by an agent of the employer to report to the site. The relevant provisions of the collective agreement concerning the hiring of employees are set out below:

“2.01 The employers shall employ as employees members of the Union in good standing in the performance of all work coming within the scope of this Agreement and shall continue in their employ only employees who are in good standing with the Union. All such employees shall be hired through the Union office except as hereinafter provided.

2.02 The Union agrees to give preference to and furnish the most competent available employees to the employers on request, provided however, that *the employer shall have the right to determine the competence and qualification of its employees, and to discharge or refuse to employ, in his sole discretion, any employee* for any just and sufficient cause. The employer shall not discriminate against any employee by reason of his membership in the Union or his participation in its lawful activities.

16.01 The Union agrees and acknowledges that the employer or his authorized representative has the exclusive right to manage the business and to exercise such right without restriction except as hereinafter provided and, without restricting the generality of the foregoing, it is the exclusive function of the employer:

(a) to determine qualifications, transfer, *hire*, direct, promote, lay off, discipline and discharge employees for just cause and to increase and decrease working forces.” [Emphasis added]

21. In our view, although the above provisions require the employers to hire through the union (except insofar as emergency men are concerned) they do not go so far as to delegate the actual hiring of employees to the union or make the union an agent of the employers for the purpose of Article 10.02. This conclusion is borne out by the actual practice of the parties. Union members referred by the union to an employer’s job site report to the employer’s local office and generally at that time are “signed on”. Occasionally, however, an employer will decline to hire a particular union member, generally because of its experience with that individual in the past. It should be noted that Article 2.02 of the collective agreement specifically recognizes an employer’s right to refuse to employ someone referred to it by the union.

22. At the hearing counsel for Local 95 filed a copy of an unreported 1964 award of a board of arbitration concerning a grievance filed by Local 95 against a company called Applied Insulation Co Ltd. The award dealt with a predecessor agreement to the one before this board. It was the opinion of the board of arbitration that because of the referral system under the collective agreement, the employer had delegated his authority to hire to the union, and had also delegated to the union its right to instruct employees to report for work. For the reasons set out above, we are unable to adopt this conclusion as being correct. We would also note that the general practice in the construction industry is that although employers must generally hire through a union hiring hall system, nevertheless, an employer has the final say in deciding whether or not to hire an individual referred to it by the union. In this regard see *The Lummus Company of Canada Limited* case, [1976] OLRB Rep. Feb. 16.

23. Our conclusion that members of Local 95 are entitled to receive board and living allowances only if directed to go to Sarnia by their employer means that most of the claims put forward by Local 95 for board and living allowances must clearly fail. In our view, it also means that Local 95 cannot succeed in its contention that the emergency came to an end when the union had members available to work in Sarnia as evidenced by the three unemployed tradesmen who accompanied Mr. Duffy to the Sarnia area. The evidence is clear that all of the employers were willing at the relevant time to hire the unemployed members of the



Local but not to pay them board and living allowances, and that because they would not be receiving such allowances the members declined to accept employment. The individuals involved, however, were not entitled to board and living allowances under the collective agreement, and thus the employers were under no obligation to offer them such allowances. Article 2.05 of the collective agreement defines an emergency as a job situation in which the union is unable to provide qualified members of the union. Article 2.04 provides that emergency help shall be replaced as soon as competent union employees are available. In our view, at the relevant time the union was unable to supply sufficient qualified union members prepared to work under the terms set forth in the collective agreement and accordingly sufficient numbers of union members were not available. This being the case we are satisfied that the emergency was still in existence and that the employers were not under an obligation to discharge their emergency help.

24. As indicated above, our conclusion that members of Local 95 were entitled to receive board and living allowances only if they were directed to go to a job site by their employer means that most of the claims for such allowances put forward by Local 95 must clearly fail. However, the facts related to certain of the employees raise the question of whether they were in fact directed by their employer to go to Sarnia but nevertheless were not paid board and living allowances. One such employee was Mr. Brian Paquin. Mr. Paquin testified that he resided in Windsor and that he began working for Lewis Insulation late in 1975 or early 1976. On a number of occasions in 1976 Mr. Paquin was directed by Lewis to report to job sites in Sarnia, and when he did so he was paid the appropriate board and living allowances. In June of 1977 Mr. Paquin was working for Lewis in Windsor when, because of a strike of electrical workers, the company ran out of work for him to do in the Windsor area. At the time Mr. Flynn, a company representative, advised Mr. Paquin that he was about to be laid off due to a lack of work, but if he so desired he could work for the company in Sarnia where he would not receive room and board but where the amount of overtime available would compensate him for his costs involved in living away from home. Although the situation is not altogether free from doubt, the statement to Mr. Paquin that he was about to be laid off but that he could if he desired work for the company in Sarnia, in our view, fell short of the company actually instructing him to report for work in Sarnia, which is what is required under Article 10.02 before an employee becomes entitled to receive a board and living allowance. Accordingly, we are not satisfied that Lewis Insulation violated the collective agreement by not paying Mr. B. Paquin board and living allowance when he commenced to work for it in Sarnia in June of 1977.

25. Although the factual situations vary somewhat, we are satisfied that this same reasoning also applies to the claims relating to J. Evans, F. Iannizi, W. Iannizi, M. Lippert and D. Paquin.

26. Mr. M. Beaudin testified that in June of 1977 he worked for Lewis Insulation in Sarnia on the Petrosar project, although his home was in Ruthven, approximately thirty miles from Windsor. For part of the time he was in Sarnia he took up residence in the area, but received no room and board allowance. Although Mr. Beaudin gave a summary of his employment history, he did not recount the circumstances under which he went to Sarnia at that time. Thus we do not know whether in June of 1977 Mr. Beaudin was directed by Lewis Insulation to go to Sarnia and accordingly we are unable to conclude that the company was in violation of the collective agreement by failing to pay him a board and living allowance. In reviewing his job history, Mr. Beaudin did refer to a week in 1976 when he worked for Lewis

Insulation in Sarnia under circumstances which may well have entitled him to board and living allowance. However, this was prior to the time period covered by Local 95's claim with respect to Mr. Beaudin and is accordingly outside the scope of these proceedings.

27. For part of the period that he worked in Sarnia on the Petrosar project subsequent to June 1977, Mr. Beaudin commuted in daily from his home in Ruthven. A number of other employees commuted in daily from London and Windsor. It was the contention of counsel for Local 95 that people travelling such distances were entitled to receive travel allowances pursuant to Article 10.01 of the collective agreement. Article 10.01 states that "employees who are working on a suburban job and returning home daily shall be on the job at starting time and work a full shift. The employer shall pay a zone travelling expense applicable to the suburban area in which the work is located". The Article provides that if a job is in "Suburban Area 5", namely beyond fifty miles of the local City Hall, the employee shall receive \$8.00 per working day. Even if we were to accept the argument that a job in the Sarnia area can properly be classified as a suburban job in terms of Windsor and London, nevertheless, the union is still faced with the fact that it agreed that all employees on the Petrosar project were to receive a \$3.00 per day travel allowance no matter where they resided. As noted in paragraph 11 above, we are satisfied that in agreeing to the \$3.00 travel allowance, Local 95 was also agreeing that no employee need be paid more than the \$3.00. In response to this agreement the respondent companies paid \$3.00 per day travel allowance to all of their employees working on the project, including individuals who by the strict terms of the collective agreement were not entitled to any such allowance. In these circumstances we are satisfied that the union became estopped from later claiming that some employees should have received more than \$3.00.

28. Having regard to all the above, the grievances are hereby denied.

#### **DECISION OF BOARD MEMBER D. B. ARCHER:**

1. I agree with the facts as stated by the majority but I have some difference in the interpretation of these facts.

2. Two letters were submitted as evidence by the respondents purporting to show agreement by the union to the companies' imposed hiring conditions. Since there is no evidence of written union agreement to these terms, and in fact Mr. Duffy in his testimony said to the company at one of their meetings "there are men out of work but they would have to be paid 'room and board'", Mr. Duffy also stated that many meetings were held and "room and board" was always a subject of discussion. No conclusive evidence viva voce or otherwise shows the union accepting the management's terms.

3. Reading Section 2.04 and 2.05 of the collective agreement regarding the declaration of an emergency situation, it does not seem to me that the terms of the agreement, particularly the section which calls for union co-operation and acceptance, have been met.

4. Paragraph 13 of the majority decision seems contradictory, it relies heavily on the union's agreement to alter the interpretation of the collective agreement giving management the right to assume what it is doing is sanctioned by the union because there are no complaints. Undoubtedly over a long period of time such an attitude becomes defensible.

5. The majority decision says “Although the evidence before us does clearly establish an agreement that board and living allowances need not be paid to travellers, we are not satisfied that the viva voce evidence or the letters quoted above go so far as to establish that the union also agreed that the board and living allowances need not be paid to Local 95 members”.

6. The union presented an interesting arbitration award suggesting that the company, through the union hiring hall procedures, had delegated the authority or shared authority to hire to the union. Thus referral by the union had the same effect as if it had been done by the company.

7. I would find that the employees sent to Sarnia were subject to the terms and conditions of the collective agreement and entitled to “board and living” allowance, whether they were sent there by the company or referred by the union.

8. The company always had the right not to hire but they could not unilaterally alter the agreement or impose conditions of employment contrary to the agreement except with proper consent of the union.

9. There is reasonable doubt as to what extent the union agreed to the conditions imposed by the company. There is no formal agreement written or otherwise. I am not prepared to accept “peaceful acquiescence” as proof of the union’s willingness to accept the company’s unilateral conditions.

10. Since I am in a minority it is not necessary for me to decide what monetary consideration, if any, I would have imposed.

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**0534-79-M** The Toronto Building and Construction Trades Council and International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicants), v. **Napev Construction Limited**, (Respondent), v. Masonry Contractors’ Association of Toronto, (Intervener #1), v. Venice Masonry Contractors (Toronto) Limited & Co., (Intervener #2), v. Bricklayers, Masons Independent Union of Canada, Local 1, (Intervener #3).

**Arbitration – Construction Industry – Jurisdictional Dispute – Parties – Section 112a – Only parties to collective agreement have standing in section 112a proceedings – Interveners claiming jurisdictional dispute underlying arbitration proceedings – Board deferring to jurisdictional dispute proceedings**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** A. M. Minsky, B. S. Fishbein, J. D. Johnson and J. Zanussi for the applicants; F. R. Von Veh, S. McCormack and P. Shishkov for the respondent; Howard W. Isenberg for interveners #1 and #2; Norman A. Endicott and John Meiorin for intervener #3.



## DECISION OF THE BOARD; September 17, 1979

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*.
2. The applicants contend that the respondent, Napev Construction Limited ("Napev") is bound to a collective agreement which requires that it subcontract masonry work only to employers who employ members of the International Union of Bricklayers and Allied Craftsmen, Local 2 ("Local 2"). It appears to be common ground that Napev has subcontracted certain masonry work on a senior citizens project in Richmond Hill to Venice Masonry Contractors (Toronto) Limited & Co. ("Venice"), a firm which employs members of Bricklayers, Masons Independent Union of Canada, Local 1 ("Local 1"). The grievance alleges this to be a violation of the collective agreement, and requests, by way of relief, both damages against Napev and an order directing Napev to either perform the work itself with members of Local 2, or sublet the work to another firm which employs members of Local 2.
3. Local 1, Venice, and the Masonry Contractors' Association of Toronto (to which Venice belongs), have intervened in these proceedings. Each of the interveners desires to participate in the hearing on the merits of the grievance, and, in particular, each takes the position that the alleged collective agreement being relied on by the applicants is not a collective agreement within the meaning of the Act. The applicants, however, contend that the three interveners lack sufficient interest to properly intervene in the proceedings.
4. The interveners' position is that they have status to intervene and participate in the proceedings in that both Venice and its employees would be adversely affected by any Board order directing Napev to use only masonry subcontractors employing members of Local 2. They also contended that underlying the grievance is a jurisdictional dispute between the two unions, and that the interveners are proper parties to such a dispute. Counsel for Local 1 further stated that if the Board concluded that Local 1 lacked status in these proceedings, then it desired an opportunity to file a formal jurisdictional dispute complaint pursuant to section 81 of the Act.
5. None of the interveners is party to, or bound by, the collective agreement alleged to be binding upon Local 2 and Napev. Although they may be incidentally or commercially affected by a determination as to the merits of the grievance, that is not a sufficient basis to accord them status. See: *Napev Construction Limited and Vepan Leaseholds Limited*, [1976] OLRB Rep. March 109. Further, the fact that a jurisdictional dispute has been alleged by the interveners does not, in our view, open the way for them to participate in a hearing on the merits of the grievance in that they still remain strangers to the alleged collective agreement. Accordingly, we are satisfied that the interveners do not have status to participate in a hearing on the merits of the grievance.
6. Having reached this conclusion, we turn to consider the request of Local 1 that it be given an opportunity to file a jurisdictional dispute complaint under section 81 of the Act.
7. Although the interveners contend that a jurisdictional dispute underlies the events giving rise to these proceedings, at the hearing counsel for the applicants insisted that no such jurisdictional dispute existed. Although we expressly decline to make a finding in this regard, preferring to leave the matter to be dealt with fully in the context of a section 81

complaint, we are satisfied that the contention that a jurisdictional dispute does exist is not a frivolous one or one which can at this point be disregarded as being clearly without merit.

8. In a section 81 complaint all trade unions and employers who may be affected by, or have an interest in the assignment of certain work may appear and participate in the proceedings, and the Board in reaching a decision is free to consider a broad range of relevant criteria. Further, once the Board makes a direction as to the assignment of work, the direction has the effect of overriding the terms of any collective agreements which do not conform with the direction. In our view, these factors mean that the resolution of disputes related to an assignment of work can be dealt with in a more appropriate manner in a section 81 proceeding than at arbitration. In this regard we would refer to the following excerpt from the Board's decision in *Eaman Riggs Limited*, [1978] OLRB Rep. March 228, a case in which the Board concluded it should entertain a section 81 complaint rather than defer to arbitration.

“33. The approach of the board of arbitration in *Re Robertson-Yates Corp. Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 18*, (1 L.A.C. (2d) 91) stresses the consensual aspect of jurisdictional claims to work and is essentially a two dimensional view of arbitration in the context of jurisdictional disputes. Such an approach no doubt serves the purposes of arbitration in the realm of collective bargaining in the industrial sector. However, the approach of this Board is three dimensional in that it first of all determines the merits of a jurisdictional dispute in a complaint under section 81 of *The Labour Relations Act* before considering a grievance under a collective agreement under section 112a of *The Labour Relations Act*. The nature of the construction industry with its craft trade unions, conflicting jurisdictional claims, the sequence of work to be performed on a project and the contractual arrangements between employers requires such a three dimensional approach. The two dimensional view reveals only an untypical cross-section of a situation in industrial relations in the construction industry whereas the three dimensional view permits the two dimensional view to be considered as part of the entire scenario of such industrial relations. This Board possesses far wider remedial powers than a board of arbitration in that, this Board may, in determining a jurisdictional dispute after hearing from all of the interested parties, alter bargaining units defined in a certificate or a collective agreement. Reference is made to section 81(15), (16), (17) and (18). In our view this Board's approach to jurisdictional disputes is more in accordance with the realities of the construction industry.”

9. Taking these considerations into account, not only are we prepared to grant an adjournment to allow the filing of a section 81 complaint, but we are of the view that such a complaint should be dealt with prior to the Board proceeding with this section 112a referral.

10. Having regard to the above, this matter is adjourned to allow Local 1 to file, and the Board to consider, a complaint under section 81 of the Act. If such a complaint is not filed within eighteen days from the date of this decision, the Board will proceed to consider the merits of this section 112a referral.

**0688-79-R** Niagara Falls Co-operative Taxi Owners Association. Applicant,  
v. **Niagara Veteran Taxi**, Respondent.

**Certification – Employee – Trade Union Status – Commencing business and insuring future employment objects of association – Employers eligible for membership – Whether association is trade union**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members D. B. Archer and James A. Ronson.

**APPEARANCES:** *H. P. Rolph, Keith Jennings and Bill Manson for the applicant; L. Bertuzzi and W. Peters for the respondent.*

**DECISION OF PAMELA C. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER D. B. ARCHER;** September 18, 1979

1. The name “Associated Cabs-Niagara Vets Taxi Company” appearing in the style of cause of this application as the name of the respondent is amended to read: “Niagara Veteran Taxi”.

2. This is an application for certification.

3. The applicant has not previously been found by the Board to be a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. Accordingly, the parties were afforded the opportunity to present evidence and argument on the threshold question of whether the Niagara Falls Co-operative Taxi Owners Association is a trade union for the purposes of the Act. This is an interim decision directed to a determination of that issue.

4. The respondent disputes that the taxi owners falling within the bargaining unit applied for by the applicant are dependant contractors or employees within the meaning of the Act and contends that they are independent contractors and, therefore, not employees under the Act. The respondent further contends that the vast majority of these persons are also employers in their own right as they themselves employ drivers to drive their taxis during their off hours and that, as employers, they are not entitled to bargain collectively. The parties agree that the Board should temporarily set both these issues aside and assume for the purposes of a preliminary decision on the Association’s status that the persons falling within the bargaining unit applied for are employees within the meaning of the Act.

5. Mr. William Peters is the owner of the respondent company. In return for weekly dues paid by the taxi owners, the company provides management, dispatcher, radio maintenance, secretarial, telephone and gas services, as well as stationery (business cards, trip sheets etc.) and the ability to participate in Peter’s regular customer accounts.

6. Mr. Robert J. Andrews, the president of the applicant Association from September 1976 through March, 1979 testified that in August, 1976 Peters gave notice that there would be an increase in the dues payable by the taxi owners. In response the owners agreed to form an association to try to protect themselves from increasing costs. On August 30, 1976 they drafted a list of demands to present to Peters containing the threat that if the demands were not met by September 7, 1976 the taxi owners would commence a strike and



withhold their services from the respondent company. The minute book kept by the Association records that Peters refused to meet with the owners to discuss their concerns and threatened to lock them out.

7. At a meeting held on Thursday, September 2, 1976 the taxi owners agreed to attempt one more time to meet with Peters in an effort to reach agreement. At the same meeting they elected an executive for the Association with Andrews being elected president. The minutes further record that they agreed that if they were not successful in their final attempt to meet with Peters, each owner would pay \$350.00 to form a new company or call a strike on September 6, 1976. The next meeting with Peters was more successful and no strike was called. On September 20, 1976 a draft agreement for the formation of the Niagara Falls Co-operative Taxi Owners Association was presented to the taxi owners present and approved by all.

8. On October 26, 1976 a formal document containing the September 20th agreement of the taxi owners was submitted to the owners for approval. The opening paragraph of the agreement reads as follows:

“THIS AGREEMENT made this 25th day of October, A.D. 1976.

B E T W E E N :

*ERIC WOOD*, of the City of Niagara Falls, in the Regional Municipality of Niagara,

hereinafter called the Party

OF THE FIRST PART

– and –

*MARY CHAPMAN*, of the said City of Niagara Falls,

hereinafter called the Party

OF THE SECOND PART

– and –

*RONALD DOUCET*, of the said City of Niagara Falls,

hereinafter called the Party

OF THE THIRD PART

– and –

[the document lists 26 additional parties concluding with]

*EDWARD MARTIN*, of the said City of Niagara Falls,

hereinafter called the Party

## OF THE TWENTY-NINTH PART”

The agreement states that the parties thereto agree among other things (1) to form an association to be known as the Niagara Falls Co-operative Taxi Association (2) to contribute \$20.00 per month as membership dues and (3) to hold, at least, an annual general meeting of the membership for the election of officers and any other matters that might come before it. The agreement further provides for the term of each office and the holding and calling of meetings. The membership requirements stipulate that each member of the Association be the owner of a duly licensed taxi carrying on business in the City of Niagara Falls. The agreement ratifies the previously elected executive and states that those officers would constitute the executive of the Association until the first annual meeting to be held not later than the 31st day of December, 1976. The evidence establishes that an election of officers was carried out in accordance with the constitution in November, 1976. The agreement is signed under seal by the 29 persons listed at the outset of the agreement.

9. The minute books and documents filed with the Board indicate that from the time of its initial organization in September 1976 the Association has had regular meetings, held regular elections of officers, amended its constitution, admitted new members and entered into a voluntary recognition agreement with the respondent.

10. Within the confines of this preliminary decision, that is, assuming that the taxi owners are employees under the Act, the respondent contends that the Association should not be granted status as a trade union for the following reasons: firstly, because the persons were not admitted as members following the adoption of the constitution, secondly, because the purpose clause in the constitution is inadequate to meet the requirements of section 1(1)(n) of the Act and, thirdly, because the membership provisions are broad enough to include Peters, their employer.

11. Section 1(1)(n) of the Act defines a trade union as follows:

“ ‘trade union’ means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.”

In meeting the criteria set out in section 1(1)(n) the Board requires that an association have an existence apart from its individual members as would be evidenced by a written constitution to which all members have indicated their adherence. It is through a duly adopted constitution which provides for the election of officers, the calling of meetings and stipulates that one of the purposes of the organization is the regulation of labour relations that an organization becomes a viable entity capable of representing its members in their relationship with their employer.

12. On numerous occasions the Board has noted that an organization taking the steps set out below will, in all likelihood, satisfy the Board’s prerequisites for obtaining status as a union:

1. Draft a constitution setting out among other things the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
2. Place the constitution before a meeting of employees for approval;
3. Admit the employees attending such meeting into membership;
4. Ratify or adopt the constitution by a vote of the said members; and
5. Elect officers pursuant to the constitution.

Taking these steps in this order, however, is not the only possible process an organization may follow to attain union status. (Note for example the Board's decision in *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472 and the cases cited therein.)

13. In this case the respondent contends that the applicant has failed to establish its status because the persons attending the meeting of October 25th were not confirmed as members after the adoption of the constitution and because they did not at that time sign application cards and pay at least \$1.00 in respect of initiation fees or monthly dues.

14. In *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273 the Supreme Court of Canada at p. 281 defined a trade union in the following terms:

“... that a Union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations: that the body as such is that to which the responsibilities for action taken of the group are to be related.”

It is implicit in this statement that a trade union is a body which has been formed by persons who have bound themselves together through contractual ties under terms which they have agreed will control their relationship to one another. This definition of a trade union implies that one is a member if he has committed himself to all the other members jointly under the terms of the contract or constitution.

15. Once a constitution has been adopted establishing an association, employees can become members by formally applying and being admitted as members. Though this is perhaps the most common procedure it is not an exclusive one. (See for example, *Comco Metal & Plastic Industries Ltd.*, [1979] OLRB Rep. June 498). In this case the document dated October 25, 1976 which contains the terms by which the taxi owners wished to regulate their Association (the constitution) is itself a contract by which the persons have agreed, each with the other, to be bound by the terms set out therein. Each person agreeing to be bound



is named in the preamble and signed under seal every other person's duplicate document. In the Board's view the parties in this case accomplished through one act what others might traditionally carry out in three: that is, forming an association, becoming members of the association and, as members, adopting the constitution. The Board, therefore, is satisfied that through the signing of the document containing the constitution of the Association, the persons named therein did what was necessary at that time to become members of the Association and, as members, affirmed their allegiance to the constitution.

16. The respondent further argued that the applicant should not be accorded status because the constitution does not indicate that one of the Association's objectives is the regulation of relations between employers and employees as required by section 1(1)(n) of the Act. The constitution contains the following clause concerning the purpose of the Association:

“The parties hereto wish to form an association to accumulate sufficient funds to purchase or begin another taxi business, to insure their future employment and to benefit their membership generally.”

Does the objective of the Association framed in terms of insuring the future employment of the taxi owners reflect an agreement that at least one purpose of the Association is to regulate the relations between Peters and the taxi owners? “To insure their future employment” is an ambiguous phrase. To ascertain its meaning, therefore, we look to the evidence of Andrews, the minutes of meetings held at the time of the formation of the Association as well as other documents which might clarify the meaning of the phrase in question.

17. The impulse behind the taxi owners' decision to form an association was Peters' notice that he was increasing their weekly dues. Upon agreeing to form their Association they presented a list of demands to Peters with the threat that if they were not met by a certain date they would go on strike. The demands included, among other matters, the requirement that dues be reduced, that they no longer be required to buy gas from Peters and pay for a gas attendant, that Peters reduce costs by dispensing with a person to answer the phone for the dispatcher, that Peters not use their dues to pay for property they didn't use, that no more cars be assigned licences without their approval and that no taxi owner be dismissed without the approval of the signatories. The minutes of their meetings, the list of demands and the testimony of Andrews indicate clearly that a prime purpose in forming the Association was to put pressure on Peters to give them more service in return for their dues and to generally improve their working relationship.

18. Having regard to all the evidence the Board is satisfied that the phrase, “to insure their future employment” reflects the Association's aim to negotiate with Peters over their terms and conditions of employment so that they could continue their employment with him rather than be forced to start their own business. Assuming that the taxi owners are in fact employees, this objective falls squarely within the scope of the requirement in section 1(1)(n) that the Association be formed for purposes that include the regulation of relations between employees and employers.

19. Regarding the appropriateness of the purpose clause, counsel for the respondent also submitted that the co-existence of the further objective of the Association, “to accumulate sufficient funds to purchase or begin another taxi business” was in direct conflict with an

aim of regulating relations between employees and employers and thus nullifies the effect of the pronounced aim of insuring their future employment. In the Board's view, however, the main purpose of the Association was to improve the working relationship between Peters and the taxi owners. The evidence indicates that it was in the event that they failed in their efforts to attain a satisfactory relationship with Peters that they were going to seek to establish their own business. Section 1(1)(n) only requires that one of the purposes of the organization be the regulation of relations between employees and employers. By its very terms the Act anticipates that an organization may have more than one purpose. To draft a constitution broadly enough to enable the owners, through the Association, to be prepared for a situation where they might decide that they would have no alternative but to start their own business does not derogate in any way from the ability of the Association to fulfil its objective of insuring the owners' future employment, that is, regulating the relationship between the taxi owners and Peters. The two aims are not mutually exclusive and may more properly be viewed as alternate objectives.

20. The final argument raised by the respondent against the Association's status as a trade union to be considered in this decision is that under the general membership criteria set out in the amended constitution Mr. Peters, the employer, could be admitted into membership and that the Association is not, therefore, an organization of employees. We note that the ensuing determination is restricted to the issue of whether the potential for Peters to become a member of the Association adversely affects the applicant's ability to obtain trade union status and leaves aside the further question of the effect, if any, of a subsequent finding that some of the taxi owners are employers in their own right.

21. The membership article of the constitution, as amended, provides as follows:

**"MEMBERSHIP**

- 1.) Any competent taxi owner of good moral character, and following the taxi profession may be eligible for membership in this Association.
- 2.) Each owner before being admitted to membership in the Association shall pay an entrance fee, and shall thereafter pay such dues, fines and assessments as may be prescribed by this Association and in accordance with this Constitution."

The applicant Association did not dispute that Peters could meet these criteria and therefore could become a member of the Association. The respondent, on the other hand, agreed that neither Peters nor any other member of the respondent's management was a member of the Association. The respondent's objection, however, is that the potential for Peters to become a member is fatal to the Association's quest for status because the Association thereby falls short of establishing that it is an "organization of employees" as required by section 1(1)(n) of the Act.

22. The scheme of collective bargaining set out in the Act is premised on a separation of identity and an arm's length relationship between trade unions and the employees they represent on the one hand and employers, i.e. persons exercising managerial functions, on the other. Without this separation a conflict of interest may result and the interests of the

employees who seek representation by a union in the regulation of their relationship with their employer may be compromised. The Legislature's intention to insure a separation between the two groups is apparent in numerous sections of the Act: Section 12 prohibits the Board from certifying a union if an employer has participated in its formation or administration or has contributed financial or other support; section 40 states that an agreement shall be deemed not to be a collective agreement if an employer has supported or participated in the union in the manner set out above; section 56 makes it an unfair labour practice for an employer to participate in or interfere with the formation, selection or administration of a trade union; section 1(3)(b) excludes from the definition of "employee" anyone who in the opinion of the Board exercises managerial functions. As well, the Board's jurisprudence on statements of desire filed either in support of a termination application or in opposition to an application for certification requires that they be free of employer involvement and section 1(1)(n) defines a union as an organization of employees.

23. Consistent with this general scheme, the Board has stated on numerous occasions that an organization composed of both employees and persons exercising managerial functions is not an organization of employees within the meaning of section 1(1)(n) of the Act. Accordingly, the Board has declined to grant trade union status to an organization which has management personnel as well as employees as members of the organization. (See *Hydro-Electric Power Commission of Ontario*, [1971] OLRB Rep. Aug. 501 and *Armour Associates Ltd.*, [1976] OLRB Rep. March 117.) An organization which has a constitution that excludes from membership persons who are not employees under the Act will not necessarily be denied status solely by virtue of the previous membership of some persons found to be managerial within the meaning of section 1(3)(b) of the Act, particularly where they were not acting on behalf of management while members. (See *York University*, [1975] OLRB Rep. Feb. 127 and *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651.)

24. Although in this case there is no self purging constitution which by the definition of a member excludes persons exercising managerial functions or persons not found to be employees under the Act, there is also no evidence of actual membership of anyone from the respondent's management. The question in these circumstances is whether the potential for a person who exercises managerial functions on behalf of the respondent to become a member sufficiently compromises the line the Act draws between unions and employees on the one hand and employers on the other to cause the Board to decide that the organization should not be given trade union status.

25. In *Chrysler Canada Ltd.* [1975] OLRB Rep. July 852 the Board addressed a similar problem. In that case the respondent argued that the organization should not be given status because the applicant's constitution defined "employees" in broad terms which in the respondent's view could have potentially included non-employees, i.e. managerial persons within the meaning of section 1(3)(b) of the Act. The Board at p. 854 dismissed the respondent's argument concluding that the mere potential for a member of management to become a member of the organization was of no effect when no such person was in fact a member:

"... we are unable to conclude that the mere possibility that non-employees may be admitted to membership is sufficient to destroy the applicant's status as a trade union. The only evidence before us is that only



two classifications – foremen and general foremen – have been admitted into membership. Subject to our finding on their status, it cannot therefore be said that non-employees are now, or have ever been, members of the applicant. We are of the view that we must take the applicant as we find it, and that speculative considerations about future membership are not relevant.”

In *Chrysler*, therefore, the Board held that the potential under the constitution for persons exercising managerial functions to be members of the organization would not, in the absence of actual membership, give rise to the conflict of interest the Act seeks to avoid and would not, therefore, preclude the organization from attaining status as a trade union.

26. In addressing the issue of an organization’s status as a trade union in a subsequent decision, *Children’s Aid Society*, *supra*, the Board focused on the membership clause under the constitution as a determining factor in concluding that the membership of a potential member of management would not adversely affect the union. The Board in the circumstances of that case stated that the test as to whether the applicant was an organization of employees must be based on the eligibility for membership of persons found to be managerial and not simply on the finding of managerial function itself. The Board indicated that if managerial persons were eligible for membership the organization would not be an organization of employees because the potential for a conflict of interest would be established. To appreciate the Board’s reasoning in these two cases, it is important to recognize that they address fundamentally different concerns and arise out of diametrically opposed fact situations. In *Chrysler*, no one from management (subject to the overriding challenge to the status of all the foremen and general foremen applied for) had ever been admitted into the organization’s membership. In *Children’s Aid Society*, on the other hand, those who were challenged as being managerial had been and continued to be active in the applicant organization.

27. The constitution of the Association in *Children’s Aid Society* excluded from membership persons who were not employees within the meaning of section 1(3)(b) of the Act. The Board was satisfied that none of the persons in the disputed classifications had acted on behalf of or in the interests of the respondent employer during his membership in the organization. Accordingly, the Board held that even if any of the challenged persons were ultimately found to be managerial under section 1(3)(b) of the Act, the finding could not adversely affect the status of the organization as a trade union because the self purging constitution would expel them from membership as soon as their managerial status under section 1(3)(b) had been confirmed. The Board focused on the membership eligibility clause in the constitution because if it had not been for the self purging nature of the membership clause these persons, if ultimately found to be managerial under section 1(3)(b), would have continued in membership and, as confirmed members of management, would have raised the conflict of interest which runs contrary to the scheme of the Act.

28. *Chrysler* arises out of the opposite fact situation where the persons in question (persons other than the foreman and general foreman applied for) were not and had not even been members of the organization. The Board found that in those circumstances the fact that the membership clause might allow a member of management to become a member of the organization did not adversely affect the organization’s quest for trade union status because unless a member of management had actually participated in the organization, as

was the case in *Children's Aid Society*, the potential for a conflict of interest would not arise. As in *Chrysler*, and unlike the situation in *Children's Aid Society*, Peters is not and never has been a member of the Association. In the circumstances of this case, therefore, the Board is satisfied that the fact that the membership requirements in the Association's constitution may be broad enough to encompass Peters does not itself taint the Association or negate a finding that it is an organization of employees as required under section 1(1)(n) of the Act.

29. For the reasons outlined above the Board is of the view that the applicant Association is a trade union. This finding, however, is a conditional one and depends on the ultimate determination that the taxi owners are employees within the meaning of the Act and is subject to arguments that might flow from a finding that some or all are employers in their own right.

30. In view of the dispute between the parties over the employee status of the taxi cab owners as set out in paragraph 4, the Board appoints Mr. N. Harper, Labour Relations Officer, to inquire into the duties and responsibilities of the persons falling within the bargaining unit applied for and the relationship that these persons have with drivers who operate their cars.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON:**

1. By a written agreement dated October 25, 1976, twenty-nine taxi cab owners formed an unincorporated association known as the Niagara Falls Co-operative Taxi Association (the "Association"). The initial objectives of the Association were expressed as follows:

"The parties hereto wish to form an association to accumulate sufficient funds to purchase or begin another taxi business, to insure their future employment and to benefit their membership generally."

2. At paragraph 5 of the document the parties agreed:

"That a member's interest in the Association shall be the ratio of the total number of taxis owned by the member to the total number of taxis owned by all the members of the Association."

3. At paragraph 10 the parties agreed:

"10(d) A majority of the members present (at a meeting) representing a majority of the total number of taxis owned by the members of the Association shall constitute a quorum:

10(e) Each member shall have one vote for each taxi owned by him and all business shall be decided by a majority of votes cast at a meeting :  
..."

4. At paragraph 11 the parties agreed:

"That each member of the Association must be the owner of a taxi, carrying on business in the City of Niagara Falls in the Province of Ontario and duly licensed by the Regional Municipality of Niagara.";

and in paragraph 12 they agreed:

“12(d) New members shall be admitted to the Association only after:

(i) Approval of the executive and a majority of the members of the Association has been given; and

(ii) Payment of the entrance fee, to be set forth from time to time by the executive has been made.”

5. On May 2, 1977 the Association adopted a document identified as the “Constitution.” The name of the Association was changed to Niagara Falls Co-operative Taxi Owners Association. The last clause of this document, headed “Additional Agreements,” reads as follows:

“The agreement made on the 25th day of October 1976 shall remain in full force and effect until such time as the Executive Board has had the opportunity to integrate that agreement into the Constitution.

The sections of that agreement not mentioned in this Constitution shall become part of this constitution for the purpose of administering association business.”

The evidence on behalf of the applicant established that the Executive Board took no action to integrate the two documents. The applicant submitted that when there was no conflict the terms of the document of October 25, 1976 had been incorporated by reference in the “Constitution”.

6. The “Constitution” sets forth additional objectives of the Association and its membership criteria as follows:

#### “OBJECTIVES

- (a) This Constitution is designed to give proper balance to the administration of this Association.
- (b) The object of this Association is to unite the taxi owners portion of the transportation profession for the better protection of its interests in general, and to encourage the settlement of all disputes between the members of the Association and the employer by whatever means necessary to achieve a settlement.
- (c) To promote and enforce good faith and fair dealings among the Association members.

#### MEMBERSHIP

- 1. Any competent taxi owner of good moral character and following the taxi profession may be eligible for membership in this Association.



2. Each owner before being admitted to membership in the Association shall pay an entrance fee, and shall thereafter pay such dues, fines and assessments as may be prescribed by this Association and in accordance with this Constitution.”

7. During cross-examination, Robert J. Andrews, the past president of the Association, testified that the Association would begin its own taxi business if necessary. Further he agreed that members of the Association who participated in the new business would remain members in good standing.

8. Mr. Andrews also agreed that William Peters, the proprietor of the respondent, was eligible for membership and could join the Association since he was the licensed owner of at least two taxi cabs.

9. Mr. Anderson further stated that one other reason for the formation of the Association was to present a unified voice in dealing with service stations, the police commission and city hall. Mr. Keith Jennings, the acting president of the Association testified that recently the Association had been successful in having the number of taxi cab licenses in the municipality limited to 55.

10. With the assumption that the taxi cab owners are employees under the Act, the evidence therefore requires the Board to decide whether Mr. Peters should be obligated to bargain with an organization which he is free to join as a member and whose initial and on-going objective is to establish a taxi business in competition with Mr. Peters.

11. In my opinion the criteria established by the Board in the *York University* and *Children's Aid Society of Metropolitan Toronto* cases require the applicant to have a “purge clause” in its constitution to exclude membership by persons exercising managerial functions. The test that the Board has applied in a long series of decisions culminating in *Chrysler Canada Limited* has been the *potential* for interference in union affairs by persons exercising managerial functions. As matters now stand Mr. Peters can join the applicant at any time. Depending on the number of taxi cabs owned by him, he could attempt to control the applicant as a result of the ownership interest, quorum and vote casting clauses found in its constitutional documents (paragraphs 2 & 3 above). As a taxi cab owner Mr. Peters may well find it advantageous to join the Association in order to present a unified position by the license-owners in their discussions with the licensing commission and with city hall. This potential for non-employee participation in the applicant is in itself enough to deprive the applicant of status as a trade union.

12. The decision of the Board in *Chrysler Canada Limited* does not assist the applicant. In that decision the Board found that two deemed employee classifications – foremen and general foremen had been admitted into membership of the applicant. The Board stated that “we are unable to conclude that the mere possibility that non-employees may be admitted to membership is sufficient to destroy the applicant’s status as a trade union.” In this case Mr. Peters is a member of the class that makes up the applicant’s membership i.e. licensed taxi cab owners. It is not a mere possibility that he may join the applicant. Mr. Peters can join the applicant whenever he chooses.

13. I am also of the opinion that the object of the applicant to establish a competing

business is incompatible with what are generally accepted as trade union objects. Section 1(1)(n) of the Act recognizes that a trade union may have objectives other than regulating relations between its members and their employer, e.g. social and recreational, educational and membership welfare purposes. But I do not think that the intent of the Act is to encourage collective bargaining between business competitors or potential competitors. The basic incompatibility between the objects of the applicant is sufficient to deny its status under the Act. Whatever it may be, the applicant is not a trade union.

14. For these reasons I would dismiss the application.

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**0306-79-U; 0307-79-U** Jacques Bradette, Hilton Rosemarin, (Complainants/Applicants), v. **Purple Heart Film Corporation**, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and Hugh Montgomerie, (Respondents).

**Charges – Discharge – Section 61 – Employer advising employees to join union or be discharged – Union assisting employer – No collective agreement in operation – Employer and union violating Act – Both jointly liable for compensation.**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members J. D. Bell and O. Hodges

**APPEARANCES:** *H. M. Pollit, J. M. Bradette and H. Rosemarin for the complainants/applicants; R. C. Filion, J. Fisher and D. Main for Purple Heart Film Corporation; C. M. Mitchell and H. Montgomerie for International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and Hugh Montgomerie.*

**DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; September 10, 1979**

1. The name “Motion Picture Studio Production Technicians, Local 873 (I.A.T.S.E.)” appearing in the style of cause in both of these matters is amended to read “International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada.”

2. File No. 0306-79-U is a complaint under section 79 of *The Labour Relations Act* which alleges that the respondents did violate sections 56, 58, 61, 63 and 66 of the Act. File No. 0307-79-U is an application for consent to prosecute the respondents for these alleged violations.

3. Both of these matters were originally filed in the name of “The Association of Canadian Film Craftspeople, Jacques Bradette, Hilton Rosemarin,” with the section 79 complaint naming a total of nine grievors alleged to have been dealt with by the respondents

contrary to the provisions of the Act. At the commencement of the proceedings the parties agreed that the name of The Association of Canadian Film Craftspeople should be stricken from the style of cause in both files. However, on the basis of the complainants' counsel's representation that he acted on behalf of all of the grievors except two, namely Mr. N. Sweetman and Mr. D. Usher (who did not attend the hearing on their own behalf) it was agreed that the section 79 complaint would be heard on its merits with respect to the remaining seven grievors. Part way through the proceedings complainants' counsel indicated that he no longer acted on behalf of Mr. M. Freeborn. Mr. Freeborn did not continue the proceedings on his own behalf. Another of the grievors, Ms. J. Liggett, personally indicated at the hearing that she no longer desired to have the proceedings continue insofar as they related to her.

4. Having regard to the above, the section 79 complaint is dismissed insofar as it relates to Mr. N. Sweetman, Mr. D. Usher, Mr. M. Freeborn and Ms. J. Liggett.

5. Each of the remaining five grievors is a "freelance craftsperson" engaged in the motion picture industry. Mr. Greco is a set decorator, Mr. Ganton a sound mixer, Ms. Parsons a "continuity girl" and Mr. Bradette a set dresser and props maker. The evidence did not touch upon the work performed by Mr. Smith, although the complainants' filings indicate he is a "key grip (stagehand)". Each of these individuals was retained by the respondent Purple Heart Film Corporation ("Purple Heart") to work on a feature film it was producing entitled "Nothing Personal." However, of the five only Mr. Greco actually worked on the film. It is alleged by the complainants that this development was brought about by certain unlawful acts on the part of the respondents.

6. We would note at this point that we are satisfied that no case has been made out against the respondents with respect to the grievor D. Ganton. As will become clear, a number of individuals were informed that they would be able to work on "Nothing Personal" only if they applied to join the International Alliance of the Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada ("IATSE"). A few days prior to his becoming aware of this requirement, Mr. Ganton had for completely other reasons applied to join the union, and no objection was raised by the respondents to his working on the film. Mr. Ganton, however, as a matter of principle indicated he did not want to work on the film, and accordingly was not called in to do so at the time that he otherwise would have been. However one might view Mr. Ganton's stand, it cannot reasonably be said that he was dealt with by the respondents contrary to the Act. Accordingly the section 79 complaint is dismissed insofar as it relates Mr. Ganton. Henceforth the term "grievors" will be used only with respect to the remaining four grievors, namely, Mr. J. Bradette, Mr. A. Greco, Ms. D. Parsons and Mr. D. Smith.

7. It was the contention of counsel for Purple Heart that the grievors could not obtain relief under the provisions of *The Labour Relations Act*. It was his submission that at the relevant time the grievors were neither employees nor capable of being employees, but instead were independent contractors. Accordingly, he submitted, they could neither be considered "employees" nor "persons" for the purposes of those sections of the Act alleged to have been violated.

8. The length of time taken to produce a feature film varies from film to film. However, the eight week projected shooting time for "Nothing Personal" is apparently not un-



sual. Many of the craftspeople working on a film will be called in to start pre-production work several weeks prior to the actual commencement of filming.

9. Once a craftsperson has completed a feature film he will generally move on to work on another feature film. If such work is not immediately available, then he may work on the production of a television commercial or short movies. Not only does a craftsperson move from production to production, but because of the practice of establishing a new corporate entity to produce each feature film, he will inevitably also move from employer to employer. Not surprisingly, many of the corporations set up to produce a single film have behind them the same "parent" company which is active in the film industry on an on-going basis. Purple Heart which was set up solely for the purpose of making "Nothing Personal", is connected with a firm called Quadrant Productions. Three of the four grievors had previously worked for at least one other film company connected with Quadrant Productions.

10. Although freelance craftspeople move from one film company to another, while working on a particular film they are unlikely to engage in any other work, if only because of a lack of time. The time spent on a set is dictated by the shooting schedule and apparently long hours are the rule rather than the exception. Miss J. King, the Production Manager for Purple Heart, also indicated that when a craftsperson is doing pre-production work he is expected to put in a full week's work for a week's pay.

11. When working on a feature film, freelance craftspeople may well perform the same type of work that is performed by staff employees in related industries. For example, Ms. Diane Parsons, who works as a "continuity girl," stated that prior to becoming a freelancer she spent five years with the Canadian Broadcasting Corporation doing the same type of work for television productions that she now does for feature films.

12. Each of the grievors is considered a self-employed person for tax purposes, and in connection therewith all of the grievors, except Mr. Bradette, used a registered company name such as "Diane Parsons Continuity." Mr. Bradette has actually incorporated a company. Notwithstanding the use of a company name or corporate entity, it is clear that it is the specific individual who is retained for a film. Further, each of the grievors brings to a production only his own personal skills. The grievors need make no major capital outlay, and none of them employs anyone else. Each of the grievors is a "key", and as such is the leading person in a specialized field working on a film. Frequently a "second" is also retained to work with a key on a film, and at times also a "third." Although a key can generally select the second or third he will be working with, the selection is subject to the approval of the film's producer or production manager, and such approval is not always forthcoming. Seconds and thirds are not paid by the keys, but rather they are paid by the film company on the basis of invoices which they submit to the company.

13. As with seconds and thirds, keys such as the grievors invoice the film company in the name of their own companies. Payment is based solely on the amount of time worked, generally calculated on the basis of so much per day with additional amounts for overtime work. Invoicing and payment is done on a weekly basis. No tax or other deductions are made from such payments.

14. Ms. King testified that when individuals in the same position as the grievors work under a collective agreement between a company producing a movie and IATSE, they also

generally utilize company names and submit invoices to cover their time. However, in addition to paying the amount invoiced for, the movie company involved also forwards welfare and pension fund payments to the union.

15. Although each of the grievors referred to himself or herself as a “freelancer”, little significance can be placed on the mere use of the label. In this regard it is worth noting that in the *Canadian Broadcasting Corporation* case, [1979] 2 Can. LRBR 41, the Canada Labour Relations Board concluded that certain freelance researchers working under fixed term contracts with the C.B.C. were employees of the Corporation. In the *Pacific Press Ltd.* case, [1977] 1 Can. LRBR 342, the British Columbia board determined that freelance writers who wrote reviews for two Vancouver newspapers were “dependent contractors” and thus came within the definition of an employee under the B.C. Labour Code.

16. Although the grievors move from film company to film company, when they are working on a film they cannot reasonably also be working elsewhere. Further, the movement between film companies is dictated by the nature of the industry. Once the production of a film is completed, a craftsperson must move on to work on another production. In this regard there is a strong similarity between these craftspersons and employees in the construction industry. In the construction industry a skilled tradesman will frequently be employed by a company to work for a relatively short period on a particular project. When the project is completed the tradesman of necessity must move on to work on another project for another employer.

17. That the grievors each uses a company name (and in one case a corporate entity) and that they invoice for their services in the name of their company and have no tax or other deductions taken from the amounts paid to them, are factors which in our view point in favour of them being considered independent contractors. However, certain other factors point towards them being considered employees. The grievors receive no return on any capital investment or entrepreneurial skill or from the employment of others. Instead they are paid solely for their own labour. Accordingly it follows that they bear no risk of loss and have no chance of an economic profit.

18. Taking all of the above considerations into account, we are satisfied that the grievors are not independent contractors, but rather that when they are employed they are “employees” under the Act. (For the purposes of these proceedings there is no need to decide whether they are “employees” in the sense that the term is generally used or “dependent contractors”, since section 1(gb) of the Act defines “employee” to include a dependent contractor.) It follows from this conclusion that even if we were to accept the contention that only employees and individuals capable of being employees can be considered “persons” for the purposes of those sections of the Act alleged to have been violated, the grievors will still be entitled to the protection of the relevant sections.

19. We turn now to consider the merits of the section 79 complaint.

20. As indicated above, Purple Heart was set up for the sole purpose of making the feature film “Nothing Personal.” Purple Heart was not, and is not, bound to a collective agreement with any trade union.

21. The grievors, except for Mr. Greco, had all worked on a film entitled “Double

Negative” which was made by a company connected with Quadrant Productions. As noted above, Quadrant Productions is also the “parent” firm of Purple Heart. On or about March 10, 1979, the last day of shooting of the film, it was indicated to the film crew of “Double Negative” that they would be given an opportunity to work on another production then scheduled to start in May of 1979. Subsequent to March 10 the grievors and a number of other keys were approached by Miss J. King, the production manager of Purple Heart, and definite arrangements made for them to work on “Nothing Personal.”

22. The shooting of “Nothing Personal” did not get under way until June 6, 1979. However, as noted above, craftspeople are frequently called in to begin work prior to actual shooting of a film. Thus it was that on April 11, 1979 the grievor A. Greco commenced working on the set.

23. At the time Mr. Greco was called in to start work, Purple Heart had not yet secured the services of a star to play the leading male role in the film. At the beginning of May the company secured the services of Mr. Donald Sutherland. According to Mr. D. Main, the producer of the film, on or about May 2nd Mr. Sutherland required that the director of photography, or “head cameraman”, on the film be Mr. L. George. Mr. Sutherland had apparently never worked with Mr. George before, but was familiar with some of his work.

24. Mr. Main testified that Mr. Sutherland’s insistence that Mr. George be used on the film created something of a difficulty. Mr. George is an active member of IATSE Local 644 and Mr. Main felt certain he would only work with an IATSE crew. Faced with these facts Mr. Main made the decision that the film would be produced using an all-IATSE crew.

25. On or about May 4, 1979 Mr. Main met with Mr. Hugh Montgomerie, an officer or representative of IATSE Local 873, and explained his decision to him. He also asked Mr. Montgomerie to offer membership in his local to 10 craftsmen who had already been hired to work on the film. Mr. Montgomerie indicated that he was satisfied with the credentials of most, if not all, of the individuals involved and that he thought they would qualify for membership in the local.

26. On May 7, 1979 Purple Heart formally retained the services of Mr. George. On May 8th Mr. Main instructed Miss King to inform the craftspersons already retained by Purple Heart that the movie would be made using an IATSE crew and while they could join IATSE, if they did not do so the company would have to pay them off.

27. In response to these instructions Miss King telephoned Mr. Montgomerie. It was arranged between the two of them that Miss King would contact the employees and then Mr. Montgomerie would do the same. Miss King testified that Mr. Montgomerie knew that she was going to inform the crew that the picture was going IATSE and that they could either join the union or receive one week’s salary.

28. The grievors and other craftsmen retained to work on the film were in fact informed by Miss King that they would have to join IATSE in order to work on the film. In response to this a number of them did apply to join the union, although the grievors did not.

29. On May 9th Miss King personally informed Mr. Bradette that he would have to join IATSE to work on the film. She also showed him a list of 10 names, including his own



and the other grievors, who if they applied to IATSE would be accepted into membership. The following day Mr. Bradette telephoned Mr. Montgomerie. Mr. Montgomerie informed him that he would be seeing Miss King on Friday, May 11th, and that anyone who had not joined IATSE by then would be replaced. Mr. Bradette then went to see Miss King, who confirmed Mr. Montgomerie's statement. Mr. Bradette did not join IATSE because, in his words, "I don't agree with IATSE's philosophy." Since he works with floor props Mr. Bradette is usually called in to work one or two weeks prior to commencement of the shooting of a film. In this case, however, he was not called in at all.

30. On Tuesday May 8th, 1979 Ms. Parsons was telephoned by Miss King and advised that the movie was going IATSE and that she would be telephoned by Mr. Montgomerie. When by Thursday, May 10th, Mr. Montgomerie had not phoned her, Ms. Parsons went to see Miss King. According to Ms. Parsons, Miss King told her that on the following day Mr. Montgomerie would be coming to see her with a list of people to replace any of those who had not joined IATSE. Following her conversation with Miss King, Ms. Parsons telephoned Mr. Montgomerie and asked if it was true that she had to join the union by the next day to work on the film, to which Mr. Montgomerie replied that it was. In her testimony Mr. Parsons stated that although she had considered joining IATSE, she did not want to rush into it since she considered it an important career decision. Accordingly she asked Mr. Montgomerie if he would be willing to permit for her to work on the movie. Mr. Montgomerie's response clearly indicated that he would rather anyone else work on the movie as a "continuity girl" rather than have Ms. Parsons do the work on a permit basis. Ms. Parsons did not join IATSE. On May 29th she contacted Miss King and was informed that someone else had been hired to do the job.

31. Mr. Smith did not testify before the Board. Indications are that at the time of the hearing he was working in New York. Miss King, however, did testify that on or about March 23, 1979 Mr. Smith accepted her offer to work on "Nothing Personal", and that he was to start work about one week prior to production. Miss King also stated that she had paid Mr. Smith "one week's salary advance" at the time he was retained. Mr. Smith's name appeared on Miss King's list as one of those who would have to join IATSE if he was to work on the film. We know that Mr. Smith did not work on the film. It is reasonable to conclude from these facts that Mr. Smith was not called in to work on the film because he had declined to join the union.

32. As already noted, the grievor Greco commenced working on the set on April 11, 1979, which was prior to Mr. Main's decision that the film would be made with an IATSE crew. On Wednesday, May 9th, Mr. Greco was advised by Miss King that he would have to join IATSE by Friday, May 11th, or leave with one week's severance pay. Later that week, however, Mr. Montgomerie informed Miss King that he felt that Mr. Greco might not be fully qualified to join IATSE, although he could apply to join the union and that in any event the union was willing to issue him a work permit with respect to this film. Mr. Greco did not apply to join IATSE. Neither did he apply for, nor as he issued, a work permit. He did, however, continue turning up for work every day and no action was taken to stop him from doing so. At the time of the hearing Mr. Greco was still working on the film.

33. As an aside, it is perhaps worth noting that part way through the production of the film, Mr. Sutherland insisted that Mr. George be removed as the director of photography on "Nothing Personal" and be replaced by someone else.

34. The complainants contend that a number of sections of the Act were violated by the respondents. However, the most relevant provisions appear to be sections 58(c) and 61, which state as follows:

“58. No employer, employer’s organization or person acting on behalf of an employer or an employer’s organization,

(c) shall seek by threat of dismissal, or by any other kind of threat, or by imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

61. No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be member of a trade union or of an employer’s organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.”

35. Counsel for Purple Heart contended that the above sections had not been violated by the company in that it employed no threats or intimidation. Rather, he submitted, the company had simply informed the grievors that the film was going to be made with an IATSE crew, and had in good faith arranged that they could join the union and thereby safeguard their jobs. We are unable to accept this submission. Miss King on behalf of Purple Heart told the grievors in no uncertain terms that notwithstanding the fact that they had previously been retained to work on the film, they could only do so if they joined IATSE. In our view this amounted to seeking “by intimidation or coercion to compel (the grievors) to become a member of a trade union” and as such constituted a violation of section 61 of the Act. Section 58(c) prohibits an employer from seeking by threat of dismissal to compel an employee to become a member of a trade union. Even assuming that the three grievors who were not called in to work on the film never actually became “employees” of Purple Heart, nevertheless Mr. Greco was working for Purple Heart when he was told by its executive director he would have to join IATSE if he wanted to continue working. We are satisfied that this amounted to the type of threat prohibited by section 58(c). Accordingly we are satisfied that the respondent Purple Heart also violated section 58(c) of the Act.

36. Counsel for IATSE took the position that even if some compulsion was used in this case, it came not from the union but rather from Purple Heart, and that accordingly the union had not violated the Act. We reject this contention. The union in this case was more than a passive recipient of employer assistance. Mr. Montgomerie was well aware of the fact that the grievors were to be given the option of either joining the union or not working on the film, and indeed he discussed the manner in which the grievors were to be approached with Miss King. Mr. Montgomerie discussed the requirement of union membership with both Ms. Parsons and Mr. Bradette, and he also advised Mr. Bradette that he would be meeting with Miss King on Friday, May 11th, 1979 and that anyone who had not joined IATSE by then would be replaced. We are satisfied that in these circumstances Mr. Montgomerie on behalf of IATSE, actively co-operated with Purple Heart in seeking by intimidation or coercion to compel the grievors to join the union and that by so doing both he and IATSE were in violation of section 61 of the Act.

37. In his submissions counsel for IATSE contended that the Board should have regard to section 38 of the Act, the relevant portions of which provide as follows:

“Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in it provisions,

(a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

• • •

(4) A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply,

(a) where the trade union had been certified as the bargaining agent of the employees of the employer in the bargaining unit; or

(b) where the trade union has been a party to or bound by a collective agreement with the employer for at least one year; or

(c) where the employer becomes a member of an employers' organization that has entered into a collective agreement with the trade union or council of trade unions containing such a provision and agrees with the trade union or council of trade unions to be bound by such an agreement;”

38. It was the contention of the union's counsel that at the time of the hearing the great majority of employees working on the movie were IATSE members and that accordingly IATSE was now in a position to enter into a collective agreement with Purple Heart requiring union membership as a condition of employment. It was his submission that because of this fact, Purple Heart had merely required union membership of the grievors at the wrong time, and that accordingly if the Act had been violated it was a mere technical violation which should not result in any remedy being issued to the grievors.

39. Section 38 is generally regarded as a “permissive provision.” It provides that under certain conditions an employer and a trade union can enter into a collective agreement requiring union membership as a condition of employment notwithstanding the fact that otherwise such a requirement would be in violation of other provisions of the Act. It should be noted that in the type of situation before us, section 38 applies only to collective agreements signed either at a time when more than 55 per cent of the employees were members of the union or after the union had satisfied the Board that it had the requisite employee support for certification. Clearly these conditions are meant to ensure that before union mem-



bership can become a valid condition of employment, the union involved must already enjoy the support of a clear majority of the employees.

40. At the time the grievors were told that they would have to join IATSE to work on the movie, the pre-conditions for the application of section 38 did not exist. IATSE had not been certified by the Board. It is doubtful if any of the employees apart from Mr. Ganton were either members of, or had applied to join, IATSE. In addition, there was not at the time any collective agreement between IATSE and Purple Heart. In these circumstances the demands put on the grievors did not come within the permissive provisions of section 38. We see little merit in the argument that at another point in time and under other conditions the respondents' actions might have been lawful. The respondents acted when they did and under circumstances which make their actions unlawful.

41. We turn now to deal with the question of an appropriate remedy. Although Mr. Greco was threatened with dismissal, he was not in fact dismissed. Accordingly it would appear that he has suffered no financial loss as a result of the respondents' actions. The other grievors, however, were not called in to work on the film. We are satisfied that in these circumstances the grievors Bradette, Parsons and Smith should be compensated for any loss of earnings occasioned by the unlawful acts of the respondents referred to above.

42. Mr. Main on behalf of Purple Heart made the initial decision that the grievors be required to join IATSE to work on the film and it was he who approached IATSE to secure its necessary co-operation in this regard. Mr. Montgomerie on behalf of IATSE actively assisted Purple Heart in seeking to unlawfully compel or coerce the grievors into joining the union. In these circumstances we are satisfied, and so direct, that Purple Heart be responsible for two-thirds of any compensation owing to the grievors and that IATSE be responsible for the remaining one-third.

43. The Board will remain seized of this matter in the event the parties are unable to agree on the amount of compensation payable to the grievors by Purple Heart and IATSE.

44. Having regard to the remedial nature of this decision, we are of the view that no legitimate industrial relations purpose is likely to be served by a prosecution of any of the respondents. Accordingly the Board's consent to any such prosecution is hereby denied.

#### **DECISION OF BOARD MEMBER O. HODGES:**

1. I concur with the majority in denying consent to prosecute and I also concur with my colleagues in finding that the workers for whom the complainant trade union acted are employees under the Act. This determination of employee status is made here for the first time in this industry. That fact has a reasonable premise on which to relieve the trade union from any liability for proceeding as it did during what should have been an organizing period. Persons in this industry may now answer in the affirmative the question "am I lawfully entitled to be represented by a trade union."

2. However, I dissent from the majority in its determination of an appropriate remedy.

3. The employer hired non-union employees and for business reasons sought to

pressure them into membership in the trade union. The trade union representative erred in joining with the employer in applying pressure to those employees. Even with the best of intentions his actions were incorrect. Properly he should have first obtained membership support from the majority of the employees and then sought voluntary recognition and a collective agreement from the employer.

4. The employer, on the other hand, could have properly approached the trade union, requesting that a crew comprised of trade union members be referred for its consideration and hiring and the employer could then have entered into a voluntary recognition agreement.

5. The adversarial arm's length relationship between a trade union and an employer required by *The Labour Relations Act* is intended, and required, as a very fundamental protection of workers' rights guaranteed by section 3 of the Act, which states:

"Every person is free to join a trade union of his own choice and to participate in its lawful activities."

6. Without doubt, what happened to Mr. Montgomerie is that he tried too hard to accommodate the employer. Of course he wanted members for his union. But the business had first employed workers in what by popular account is a growing industry providing jobs for skilled and talented specialists in Canada. Had he been given the opportunity by the employer to assemble a crew of union members it appears that only very limited staffing problems would have been encountered.

7. The majority have correctly noted the very short term during which this respondent required production staff, a characteristic of this growing Canadian industry. I agree that this aspect of the respondent's business is much akin to many construction projects. Normal industrial certification procedures are clearly not suited to these short term employment situations.

8. IATSE and Mr. Montgomerie, as its representative have offended section 61 of the Act. Given the limited jurisprudence of the Board with regard to the unique nature of film industry and its employee relationships, I would not hold the trade union liable for any part of the stipend, wages or salary found to be due to the grievors.

9. My finding as to remedy is that the respondent employer make good all original employment contracts, verbal or written, offered to the grievors, by paying the grievors in full as though they had been at work under the terms of their contract, until the picture was completed.

10. I concur with the majority in the decision to remain seized of this matter in the event the parties are unable to agree upon the amount of compensation payable.

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**1231-78-R** International Molders & Allied Workers Union, (Applicant), v. **Rehau Plastiks of Canada Limited**, (Respondent), v. Group of Employees, (Objectors).

**Employee – Whether lead hand exercising managerial functions – Criteria reviewed**

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *Murray Hart and Gordon Plancke for the applicant; W. S. Challis and C. C. E. Eames for the respondent; no one for the objectors.*

**DECISION OF THE BOARD;** September 19, 1979

1. An interim certificate has been issued to the applicant under section 6(1a) of *The Labour Relations Act*. The remaining issue is whether five persons designated by the respondent as lead hands are to be excluded from (as the respondent contends) or included in (as the applicant contends) the bargaining unit. The Board has heard from the submissions of the parties on the report of the Examiner who was appointed to inquire into the duties and responsibilities of the lead hands.
2. The respondent manufactures plastic piping in a plant which operates three shifts per day, five days per week. At the time of this application it employed 26 employees, including the five lead hands, in the bargaining unit proposed by the applicant. There is also a plant supervisor ("supervisor") and a plant manager ("manager"). The lead hands perform the same work as other employees in the bargaining unit but, in addition, assist the supervisor and manager with the direction of the work force. The question before the Board is whether these additional responsibilities constitute the exercise of managerial functions within the meaning of section 1(3)(b) of the Act. If they do, the lead hands would be excluded from the right to representation under the Act and thus could not be included in the bargaining unit.
3. The significance within the scheme of the Act of whether a person exercises managerial functions is clearly enunciated in paragraph 12 of the Board's decision in *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396, as follows:

"The identification of management is fundamental to the scheme of collective bargaining as set out in *The Labour Relations Act*. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining



rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.”

The Board, having regard to this underlying purpose of the exclusion from the Act of persons exercising managerial functions, has excluded as managerial, persons who can materially affect the terms and conditions of employment of employees either directly or by the exercise of effective recommendation. It is not the mere existence of supervisory function which determines the exclusion; rather, it is whether the exercise of the supervisory duties by themselves or in combination with other duties and responsibilities affect the terms and conditions of employment.

4. The five lead hands in this case have responsibilities in respect of the three production departments: bellling, mixing and extrusion. There is one lead hand for each of bellling and mixing and three lead hands, one on each of three shifts, for extrusion. The authority and responsibility of lead hands has been posted in writing since July 1973 and, in those matters relating to the direction of the work force, includes responsibility in their departments for:

- (a) the quality and quantity of output;
- (b) general housekeeping and safety;
- (c) completing and submitting required reports;
- (d) verifying on employees' time cards the regular and overtime hours worked; and
- (e) security of the plant on the afternoon and night shifts and weekends.

The same document establishes a line of reporting that has the operators reporting to the lead hands who report to the supervisor who, in turn, reports to the plant manager. The evidence indicates that the reporting relationship is more flexible in practice with operators having direct access on production problems to both the supervisor and the manager. This is not surprising considering the size of the operation in terms of manpower. The five lead hands supervise approximately 12 employees distributed over three shifts. Each extrusion lead hand works on a shift with a crew of two operators and is responsible for his shift. The mixing lead hand works on day shift with an operator. He has a second operator on the afternoon shift and, while the mixing lead hand is responsible for the results on that shift, the extrusion lead hand supervises the operator. The bellling lead hand works on day shift but is responsible for his operators on the other two shifts as well. This is the organizational format within which the lead hands provide a supervisory link between the employees and the plant supervisor.

5. Within this format the lead hands' responsibilities which relate to the direction of the employees who work under their supervision fall into two general categories:

- (a) the training of new operators, and

- (b) the assignment of daily work tasks and the responsibilities which flow from it.

The lead hands instruct the trainees, evaluate their performance during training and recommend to the supervisor when a trainee is ready to take each of two tests they must pass before becoming an operator. Two probationary increases are dependent on the trainees' success with the tests. Thus a lead hand's recommendation that an employee is ready for a test does influence the timing of a trainee's opportunity for these two pay increases. Failure of a trainee to pass these tests may eventually result in his termination but the evidence does not support the conclusion that lead hands effectively recommend termination of employment in these instances. The lead hands assign employees to their daily work tasks, adjusting these assignments during the shift when circumstances require. When the manager or supervisor has scheduled overtime, the lead hands determine which employees will be assigned to which overtime work. They verify on employees' time cards the daily regular and overtime hours worked. They have discretion to authorize pay for the balance of a shift if they send an employee home who becomes ill and can authorize unpaid leave for the balance of a shift for other absences of employees. In keeping with the lead hands' responsibility for quantity and quality of output, if an employee's output on his assigned task is unacceptable, whether it results from operator fault or problems with the machines or materials, they decide and take corrective measures. There is no evidence that the lead hands have applied discipline when operator fault is involved, except possibly with trainees and then in the context of them not succeeding to an operator if they fail to correct their performance.

6. Lead hands receive an hourly rate of pay and a premium rate for being a lead hand. They are paid for overtime work. Each lead hand has a desk but not an office, and a key to the plant but not to the office.

7. There is no evidence of the lead hands having authority for such matters as setting work schedules, deciding if overtime is to be worked, monitoring absences of employees, discipline, complaints resolution, hiring or firing. Nor is there any evidence that they influence these matters by means of effective recommendation. Considering that two of the lead hands have been in that capacity for nine years and another one six years, the absence of evidence may be taken as a reliable indication that they do not have authority in these aspects of supervision.

8. It is clear that the lead hands are the first link in the supervisory chain of command. It is likewise clear, however, that their supervisory responsibilities, taken as a whole, do not directly or materially affect the employment relations of the employees whom they supervise in such a way that would create a conflict of interest in collective bargaining should the lead hands be included in the bargaining unit. The title "lead hand" accurately reflects their duties and responsibilities as of the making of this application and the Board finds that they do not exercise managerial functions within the meaning of section 1(3)(b) of the Act.

9. Thus the composition of the bargaining unit is resolved. The Board finds accordingly that all employees of the respondent at Prescott, Ontario, save and except persons above the rank of lead hand, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. A formal certificate will now issue to the applicant.

**0702-79-U John St. Hilaire, (Complainant), v. U.A.W. Local 1459 (Respondent).**

**Duty of Fair Representation – Verbal agreement between employer and union – Grievor seeking relief contrary to verbal agreement – Union settling grievance seeking maintenance of credibility with employer – Valid collective objective paramount to grievor's interest – No violation of section 60**

**BEFORE:** E. Norris Davis, Vice-Chairman and Board Members F. W. Murray and D. B. Archer.

**APPEARANCES:** *John St. Hilaire and Mike McCue for the complainant, Martin A. Marino and Ed Ferrari for the respondent.*

**DECISION OF THE BOARD;** September 4, 1979

1. The complainant alleges a contravention of section 60 of the Act and seeks appropriate remedial relief against the respondent.
2. The complainant is employed at the Chrysler Etobicoke casting plant as a store clerk and was elected in late May 1978 as the second shift representative on the Plant Shop Committee. The Committee regularly meets with management representatives on Tuesday of each week provided an agenda has been established. The current collective agreement between Chrysler and Local 1459 U.A.W. provides:

“21 Special Conferences

(a) Special conferences for important matters may be arranged between representatives of the Local Union and the Labor Relations Supervisor, or the Plant Manager or his designated representative. The Union representatives at such special conferences shall be limited to members of the Plant Shop Committee and the four ranking Local Union officers. Upon request, the Regional Director of the Union for the area in which the plant is located, or his regular representative, may also attend. Arrangements for such special conferences shall be made in advance with the Labor Relations Supervisor, or the Plant Manager or his designated representative, by the Chairman of the Plant Shop Committee or the President of the Local Union, and an agenda of the matters to be taken up at the meeting shall be presented at the time the conference is requested. Matters taken up in special conferences shall be confined to those in the agenda.

(b) Union representatives as specified in Subsection (a) above if working in the plant shall receive pay from the Corporation at their regular hourly rates for the time spent in such special conferences, provided they would otherwise have worked in the plant during the time spent in such conferences.”



There has been a verbal understanding existing for some years going back to 1967 between the Company and the Union that in order to facilitate the functioning of the Plant Shop Committee the Company would arrange, on those days on which meetings were to be held, to transfer for that day only, Shop Committee representatives employed on second and third shifts to the day shift, so that such persons would be available for meeting without loss of wages. That verbal understanding was conditioned on a verbal undertaking by the Union not to process any grievance which might be founded on a claim for payment by a transferred employee at overtime rates if the transfer resulted in his working more than eight hours in a twenty-four hour period. It is noted, that, aside from this verbal understanding there is no contractual right on which a Shop Committeeman can insist on being transferred for Committee meetings.

3. It appears that the complainant and the third shift Committeeman refused to undertake to the Company that they would not grieve for overtime pay by virtue of attending these meetings, and as a consequence the Company refused to make the transfer to day shift for the days of meeting. The third shift Committeeman (with whom we are not here concerned) subsequently abandoned his position and provided the necessary undertaking, and the complainant took the path of not attending meetings. Ultimately the Recording Secretary of the Union notified the complainant in writing that his continued failure to attend meetings would result in his removal from office in accordance with the Local Constitution.

4. The complainant, who testified that he had been told by the Personnel Manager that he would not be paid for Committee meetings unless he guaranteed not to submit a grievance for overtime pay, was questioned extensively by a Board Members as to whether the complainant could think of any reason for the Personnel Manager's position. The complainant, in response, could think of no reason. In view of the testimony of Ferrari and of McCue of the long-standing understanding between the Company and the Union we are satisfied that the complainant was less than frank in his testimony.

5. Ferrari testified that at the October 22nd general meeting a question was raised by one Pat Daugherty, as to whether Ferrari would approach the Company to arrange for St. Hilaire's attendance at Shop Committee meetings. Ferrari agreed that he would do this provided St. Hilaire was not still taking the position that he had to be "scheduled", and Ferrari also stated that he would not process a grievance which was based on a request for overtime premiums. On October 23rd Ferrari gave letters to both the Company and to St. Hilaire stating that he would not process a grievance based on overtime. It is noted that the same problem which had existed with the third shift Committeeman had earlier been resolved in a similar manner. In that case the third shift Committeeman had given an assurance to Ferrari not to grieve for overtime pay and Ferrari in turn gave the same assurance to the Company.

6. These events resulted in two grievances being filed by the complainant for payment for time so spent, and one grievance arising out of a disciplinary suspension for failure to obey instructions to report for work on his regular shift. These grievances were processed through the first and second steps of the grievance procedure at which time the Shop Committee moved them to the President of the Union who is responsible for carrying grievances to the third step.

7. The complainant gave evidence that he has never been advised as to the status or disposition of his grievances. Mr. McCue, who appeared at the hearing as agent represent-

ing the complainant, gave testimony that he is currently and has been since 1974 plant chairman of the Plant Shop Committee and that over that period there has always been a Shop Committeeman on each of the second and third shifts. McCue also testified that there has never been any formalized procedure by which status of grievance's moved to the third step is reported to the Shop Committee or the grievor, and that sometimes he could make enquiry of the Personnel Manager and secure information, or would be referred by him to the President, who might say "bring it up at the meeting". McCue states that he personally gave the grievances here concerned to Ferrari the Local President and that on these occasions Ferrari had "nothing much to say". Ferrari, on the other hand, testifies that he has been President of the Local since July 1978 (and previously between 1967-74) and that it is his practice where he effects a grievance settlement to search out the person concerned and to advise him, but that he didn't search out the complainant because of personal relations between them. Ferrari testified that when McCue gave him the complainants grievances he (Ferrari) was already thoroughly familiar with the background and told McCue "we've been through this for weeks and the guy hasn't got a grievance but I'll handle it", and also that he told McCue the grievance would be withdrawn. We accept Ferrari's testimony in these regards.

8. Ferrari also testified that it was within one month of the complainant's first grievance being filed, that he was approached by the complainant. This took place in the lobby of the work place and the complainant handed Ferrari a slip of paper containing the identification numbers of his three grievances and asked what had happened to them. Ferrari testified he then told St. Hilaire the grievances had been withdrawn. The complainant asked to have this confirmed in writing and was told that such was not the practice. Ferrari further testified that it was not the practice of this Union throughout the Chrysler organization to give such answers in writing. A letter dated December 1st, 1978 signed by St. Hilaire and directed to Ferrari states "I maintain you have dropped my grievances on the basis of hostility and arbitrariness towards me." and renewed his request for a written answer together with reasons. This letter of December 1st clearly establishes that St. Hilaire had been informed as to the status of his grievances.

9. Ferrari testified that while the third step by contract is a request to the Company to refer the matter to the Windsor office, the practice is that there is first an informal attempt to adjust the grievance (and there are printed forms for this purpose). In the case of these grievances the informal step discussions took place and resulted in Ferrari withdrawing the grievances. Ferrari states he had considered letting the grievances to go forward to Windsor but following his attendance at an International meeting in Detroit in which there were discussions about clogging up the grievance procedure with grievances having no merit, he concluded these were grievances which should be withdrawn.

10. While it is not the function of this Board to adjudicate the merits of St. Hilaire's grievances the pressure or absence of *prima facie* merit will sometimes cast light on the motives of bargaining agents' representatives in the handling of the grievances. In the instant case the complainant had filed grievances arising out of the action of the Company in refusing to transfer him to day shift for Shop Committee meetings and in therefor refusing to pay him for attendance. Ferrari testified that he was present at a time when the complainant sought to be paid at overtime rates for attendance at meetings and this was the reason for the Company seeking re-assurance that the terms of the long-standing verbal understanding between the Company and the Union would be honored. In the subsequent filing of grievances

and their withdrawal after being processed through the second step, we find the Union to have been acting in a responsible manner designed to maintain its credibility in its collective bargaining relationship with the Company which objective was a collective objective paramount to the complainant's interest in having the grievances carried to a further step in the grievance procedure. There was no evidence to support an allegation that St. Hilaire's grievances were handled in any discriminatory fashion, or that the Union in settling them had acted either in bad faith or arbitrarily.

11. The Board received considerable evidence, both oral and documentary, relating to processing of a charge filed under the Union constitution against Ferrari by St. Hilaire, and which was ultimately denied by the International President of Union. In our view none of this evidence is germane to the issue before the Board. It is obvious to the Board that there exist some strong differences of opinion within the Local Union as to the manner in which internal affairs are conducted, but the Board does not draw any inference from this state of affairs that the interests of the complainant in the handling of the grievances concerned were, in any way dealt with contrary to the statutory obligation contained in section 60 of the Act.

12. The complaint is dismissed.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1979

### BARGAINING AGENTS CERTIFIED DURING AUGUST

#### No Vote Conducted

**1804-78-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Century Flooring Limited (Respondent).

Unit: "all dependent contractors working as carpenters and carpenters' apprentices for the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

**2007-78-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 (Applicant) v. The Tower Company (1961) Ltd. and Burjan Construction Company Ltd. Joint Venture (Respondent).

Unit: "All employees of the respondent in the City of Cornwall save and except foremen, persons above the rank of foreman, persons who regularly work not more than twenty-four (24) hours per week, office and sales staff and local contact men." (9 employees in the unit). (*Having regard to this agreement*).

**0001-79-R:** Public Service Alliance of Canada (Applicant) v. Forintek Canada Corp. (Respondent).

Unit: "all employees of Forintek Canada Corp., Ottawa, save and except Department Managers and those above the rank of Department Managers, Confidential Secretaries to J. E. Stone, Mr. Clark, E. L. Fowler, I. B. Flann, S. McKenzie, Divisional Controller, and students employed during the school vacation period." (110 employees in the unit). (*By agreement of the parties*).

**0055-79-R:** Service Employees Union, Local 204 (Applicant) v. Prevocational and Development Training Centre of the St. Catharines Association for the Mentally Retarded (Respondent).

Unit: "all employees at the Prevocational Training Centre, #2 Cushman Rd. Unit D. or #3 in St. Catharines, Ont. save and except persons regularly employed for less than 24 hours per week, persons above the rank of Senior Supervisor or Project Director, and office staff." (3 employees in the unit).

**0278-79-R:** Amalgamated Clothing and Textile Workers Union (Toronto Joint Board) (Applicant) v. Straton Knitting Mills Limited (Respondent) v. Group of Employees (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, designers, sales and office staff and students employed during the school vacation period." (146 employees in the unit). (*Having regard to the agreement of the parties*).

**0283-79-R:** Canadian Union of Public Employees (Applicant) v. Carleton University Students' Association, Inc. (Respondent).

Unit: "all employees of Carleton University Students' Association, Incorporated, employed by the corporation at the University Centre, Carleton University, Ottawa, save and except business manager and accountant, persons employed for not more than twenty-four hours per week and students employed during the school vacation." (12 employees in the unit). (*Having regard to the further agreement of the parties*). (*Clarity note*).

**0372-79-R:** United Steelworkers of America (Applicant) v. Otaco Limited (Respondent).

Unit: "all employees of the respondent at Orillia employed as truck drivers, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (4 employees in the unit).

**0537-79-R:** Retail, Wholesale and Department Store Union, AFL:CIO: CLC (Applicant) v. The Great Atlantic and Pacific Company of Canada Limited (Respondent).

Unit: "all machine operators employed by the Respondent on the Ordermatic Selecting System Machine at 5559 Dundas Street West, Islington, Ontario." (2 employees in the unit).

**0584-79-R** Labourers' International Union of North America Local 527 (Applicant) v. Gaydon Contractors Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa - Carleton and the United Countries of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0587-79-R:** United Steelworkers of America (Applicant) v. Fotomat Canada Limited (Respondent).

Unit: "all employees of Fotomat Canada Limited engaged in retail sales in the City of Barrie, save and except supervisors and persons above the rank of supervisor." (3 employees in the unit).

**0593-79-R:** International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) (Applicant) v. Waugh & MacKewn Limited (Respondent).

Unit: "all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (15 employees in the unit). (*Having regard to the agreement of the parties*).

**0597-79-R:** Service Employees' Union, Local 210, Affiliated with Service Employees' International Union, A.F.L.-C.I.O.-C.L. (Applicant) v. Kilbarchan Nursing Home (Respondent).

Unit: "all employees of Kilbarchan Nursing Home at Seaforth, Ontario, save and except supervisors, persons above the rank of supervisor, Registered Nurses and office staff." (24 employees in the unit). (*Having regard to the agreement of the parties*).

**0598-79-R:** Service Employees' Union, Local 210, Affiliated with Service Employees' International Union, A.F.L., C.I.O., C.L.C. (Applicant) v. Kilbarchan Nursing Home (Respondent).

Unit: "all Registered Nurses employed at Kilbarchan Nursing Home at Seaforth, Ontario, save and except supervisors, persons above the rank of supervisor and office staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).



**0637-79-R:** Ontario Public Service Employees Union (Applicant) v. Cybermedix Limited (Respondent).

Unit #1: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical employees and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (111 employees in the unit). (*Certified*).

Unit #2: "all employees of the respondent in Metropolitan Toronto, Ontario, regularly employed for not more than 24 hours per week, students employed for the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical employees." (20 employees in the unit). (*Dismissed*).

**0666-79-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Vicbert Inc. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa - Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**0668-79-R:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #128 (Applicant) v. Aquachem – Tanker Services Limited (Respondent).

Unit: "all employees of the respondent in Huron Park, Ontario, save and except foremen, those above the rank of foremen, office staff, persons regularly employed for not more than 24 hours per week and student employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

**0669-79-R:** Canadian Union of Public Employees (Applicant) v. The Arnprior and District Memorial Hospital (Respondent).

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period at 350 John Street North, Arnprior, Ontario, save and except professional medical staff, graduate nurses, under-graduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, department heads, persons above the rank of department head and persons covered by any subsisting collective agreement." (16 employees in the unit).

**0680-79-R:** Association of Allied Health Professionals: Ontario (Applicant) v. Victorian Order of Nurses, London-St. Thomas Branch (Respondent) v. Canadian Union of Public Employees (Intervener).

Unit: "all paramedical employees of the respondent in the City of London and the County of Middlesex save and except nurses, supervisors, persons above the rank of supervisor, students employed during the school vacation period and persons covered by subsisting collective agreements." (14 employees in the unit). (*Having regard to the agreement of the parties*).

**0687-79-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Niagara Ready-Mix Limited (Respondent).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

**0693-79-R:** International Union of Electrical, Radio and Machine Workers (Applicant) v. Quality Circuits Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except plant managers, persons above the rank of plant manager, office and clerical staff." (40 employees in the unit). (*Having regard to the agreement of the parties*).

**0695-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Evercrete Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the installation and/or erection of fences save and except non-working foremen and persons above the rank of non-working foremen." (12 employees in the unit).

**0701-79-R:** United Steelworkers of America (Applicant) v. ESB Canada Limited (Respondent).

Unit: "all employees of the respondent in the City of Woodstock, save and except foremen, persons above the rank of foreman, professional engineers, laboratory technicians, quality control inspectors, office and sales staff and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**0705-79-R:** Canadian Union of Public Employees (Applicant) v. Kingston Regional Hospital Laundry Incorporated (Respondent).

Unit: "all employees of the respondent in Kingston, Ontario regularly employed for not more than twenty-four hours a week and students employed during the school vacation period save and except office staff, supervisors, those above the rank of supervisor and those persons covered by a subsisting collective agreement with the Canadian Union of Public Employees and its Local 2060." (22 employees in the unit).

**0708-79-R:** Alliance Employees' Union (Applicant) v. Public Service Alliance of Canada (Respondent).

Unit: "all employees of the respondent employed as office support staff at 233 Gilmour Street, Ottawa, Ontario, save and except those employees employed in a confidential capacity; employees represented by the Ottawa Typographical Union, Local 102, and employees employed as office support staff in the National Capital Region Office, 233 Gilmour Street, Ottawa, Ontario." (66 employees in the unit). (*Clarity note*).

**0719-79-R:** Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. 358906 Ontario Ltd. Operating as Woody Woods (Respondent).

Unit: "all employees of the respondent in Hearst, Ontario, save and except foremen and persons above the rank of foreman." (13 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity notes*).

**0721-79-R:** International Molders & Allied Workers Union (Applicant) v. Milton Bradley Canada Inc. (Respondent).

Unit: "all employees of the respondent of Mississauga, Ontario, save and except quality control per-

sonnel, assistant supervisors (Assist. foremen), supervisors (foremen), persons above the rank of supervisor, plant cathode ray tube operator, office and sales staff and students employed during the school vacation period.” (84 employees in the unit). (*Having regard to the agreement of the parties*).

**0724-79-R:** United Steelworkers of America (Applicant) v. Vulcan Welding Supplies a division of Liquid Carbonic Ltd. (Respondent).

Unit: “all employees of the respondent in the City of Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

**0725-79-R:** United Steelworkers of America (Applicant) v. Fromson Heat Transfer Ltd. (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman and office staff.” (44 employees in the unit). (*Having regard to the agreement of the parties*).

**0733-79-R:** Ontario Public Service Employees Union (Applicant) v. Fergus District Ambulance Service – operating out of Fergus (Respondent).

Unit: “all employees of the Fergus District Ambulance Service operating out of Fergus, save and except operations manager, persons above that rank, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (3 employees in the unit).

**0743-79-R:** Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 180 Steeles Avenue West in the Village of Markham, in the Regional Municipality of York, save and except hostesses and persons above the rank of hostess.” (53 employees in the unit). (*Having regard to the agreement of the parties*).

**0756-79-R:** Division 113, Amalgamated Transit Union (Applicant) v. North Bay Bus Terminal (Respondent).

Unit: “all employees of the respondent at North Bay, save and except the manager and persons above the rank of manager.” (9 employees in the unit).

**0763-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Con-Elco Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

**0765-79-R:** Lumber and Sawmill Workers’ Union Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Levesque Lumber (Hearst) Limited (Respondent).



Unit: "all employees of the respondent, in its woods and garage operations, in the District of Cochrane, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed as scalers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (36 employees in the unit). (*Having regard to the agreement of the parties*).

**0769-79-R:** Printing Specialties & Paper Products Union Local 701 London, Ontario (Applicant) v. Atlantic Packaging Products Ltd. (Respondent).

Unit: "all employees of the respondent located at Ingersoll, Ontario, save and except foremen, persons above the rank of foreman, office staff and sales staff." (2 employees in the unit).

**0771-79-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Dominion Stores Limited (Respondent).

Unit: "All construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**0772-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. A.B.B.A. Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and The Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foreman and persons above the rank of non-working foreman." (7 employees in the unit).

**0773-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Trust Company (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 11 Wincott Drive, Weston, Ontario, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*).

**0779-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pentagon Construction Canada Incorporated (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**0783-79-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning services at the Ottawa International Airport, Ottawa, save and except foreman and foreladies persons above the rank of foreman and forelady office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students." (29 employees in the unit). (*Having regard to the agreement of the parties*).

**0789-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent in the Town of Oakville, in the Regional Municipality of Halton and Province of Ontario, save and except hostesses and persons above the ranks of hostess." (36 employees in the unit). (*Having regard to the agreement of the parties*).

**0796-79-R:** Canadian Union of Public Employees (Applicant) v. City of Kanata (Respondent).

Unit: "all employees of the respondent, in the City of Kanata, save and except foremen, persons above the rank of foreman, office clerical and technical staff and persons regularly employed for not more than twenty-four hours per week and employees covered under existing collective agreement between Canadian Union of Public Employees Local 1670 and City of Kanata." (6 employees in the unit).

**0815-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Combustion Engineering Superheater Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**0816-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Arthur Blakely Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employers as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**0820-79-R:** International Brotherhood of Electrical Workers Local Union 115 (Applicant) v. Canadair Services Limited (Respondent).

Unit: "all employees of the respondent at the U.T.D.C. Test Tract Facility, Millhaven, Ontario, save and except foremen, technical and office employees, professional and administrative employees, and sales and clerical staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**0821-79-R:** The International Association of Machinists and Aerospace Workers (Applicant) v. CAE-Montupet Diecast Ltd. (Respondent).

Unit: "all employees of the respondent in the City of St. Catharines save and except foremen, persons above the rank of foreman, office and sales staff and engineering staff." (12 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity notes*).

**0830-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B. Q., (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent in the Town of Markham, in the Regional Municipality of York, save and except hostesses and persons above the rank of hostess." (60 employees in the unit).

**0841-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Elio Evangelista Investments Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0845-79-R:** Service Employees Union, Local 268 (Applicant) v. Plummer Memorial Public Hospital (Respondent).

Unit: "all office and clerical personnel of the respondent at Sault Ste. Marie regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduating nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, and persons covered by subsisting collective agreements." (14 employees in the unit). (*Having regard to the agreement of the parties*).

**0869-79-R:** Ontario Nurses' Association (Applicant) v. Extendicare Ltd./Peterborough (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Peterborough, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week." (3 employees in the unit).

Unit #2: "all registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the respondent at Peterborough, save and except the Director of Nursing and persons above the rank of Director of Nursing." (1 employee in the unit).

**0880-79-R:** Teamsters Local Union 1000, Brewery, Soft Drink, Distillery, Distributors & Miscellaneous Workers, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Barnes Wines Limited (Respondent).

Unit: "all employees of the respondent working at or out of its plant in St. Catharines, Ontario, save and except foremen, those above the rank of foreman, laboratory supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons employed on a seasonal basis for the vintage at the time of the grape harvest." (9 employees in the unit). (*Having regard to the agreement of the parties*).

**0881-79-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Reliance Products Ltd. (Respondent).

Unit: "all employees of the respondent at Milton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (56 employees in the unit). (*Having regard to the agreement of the parties*).

**0887-79-R:** London and District Service Workers Union, Local 220, S.E.I.U., A.F.L., C.I.O., A.F.L. (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as Owner and operator of St. Mary's Hospital, London, Ontario (Respondent).

Unit: "all lay employees of the respondent at London, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, technical personnel (including in this excep-



tion, graduate and undergraduate: audiologists, physio-, recreational, occupational, respiratory and speech therapists and laboratory technicians), supervisors, foremen, persons above the rank of foreman, chief engineer, stationary engineers and helpers (as per certificate of Ontario Labour Relations Board dated the 28th day of November, 1978), office and clerical staff (including in this exception ward clerks, admitting clerks, receptionists, information clerks, mail clerks, cashiers, librarians and switchboard operators), persons regularly employed for not more than twenty-four (24) hours per week and students employed during school vacation periods." (28 employees in the unit). (*Clarity notes*).

**0897-79-R:** Laborers' International Union of North America Local 247 (Applicant) v. Napev Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**0536-79-R:** Retail, Wholesale and Department Store Union AFL; CIO; CLC (Applicant) v. The Borden Company, Limited, Ottawa Dairy Division (Respondent) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener).

Unit: "all office employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor and the secretary to the General Manager." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots		10
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener	0	

**0592-79-R:** Retail, Wholesale and Department Store Union, AFL; CIO; CLC (Applicant) v. Oxford House Tavern (Respondent).

Unit: "all employees of the respondent at London, save and except the Manager, and persons above the rank of Manager." (18 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots		11
Number of ballots marked in favour of the applicant	7	
Number of ballots marked against the applicant	4	

**0690-79-R:** Canadian Union of Public Employees (Applicant) v. Winchester District Memorial Hospital (Respondent).

Unit: "all employees of the respondent regularly employed for not more than 24 hours per week at the Winchester District Memorial Hospital, Winchester, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate phar-

macists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for more than 24 hours per week, and persons covered by any subsisting collective agreement.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	1	

**0691-79-R:** Canadian Union of Public Employees (Applicant) v. Winchester District Memorial Hospital (Respondent).

Unit: “all employees of the respondent employed at the Winchester District Memorial Hospital, Winchester, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, secretary to the Director of the hospital, payroll officer, supervisors, foremen, persons above the rank of supervisor and foreman, non-professional staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by any subsisting collective agreement.” (28 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	24	
Ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	5	

### Applications Certified Subsequent to Post-Hearing Vote

**0341-79-R:** Service Employees Union Local 268 (Applicant) v. Walter P. Hogarth Memorial Hospital (Respondent).

Unit: “all employees of the respondent at its hospital at Thunder Bay regularly employed for not more than twenty-four hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and persons covered by a subsisting collective agreements.” (24 employees in the unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	0	

**0437-79-R:** Ontario Nurses' Association (Applicant) v. Prince Edward County Memorial Hospital (Respondent).

Unit: “all registered and graduate nurses regularly employed by the respondent at Picton in a nursing capacity for not more than 24 hours per week, save and except nursing supervisors and persons above the rank of nursing supervisor.” (17 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots	6	
Number of ballots marked in favour of the applicant	6	
Number of ballots marked against the applicant	0	

**0636-79-R:** Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of Ottawa-Carleton (Respondent).

Unit: "all employees of The Children's Aid Society of Ottawa-Carleton, in the Regional Municipality of Ottawa-Carleton, working not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical employees, operational employees and persons covered by subsisting collective agreements." (62 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	0	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0272-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. George & Asmus-sen Ltd. (Respondent) v. Labourers' International Union of North America – Local 1081 (Intervener). (4 employees).

**0485-79-R:** United Brotherhood of Carpenters & Joiner of America, Local 1988 (Applicant) v. O. J. Gaffney Limited (Respondent). (11 employees).

**0621-79-R:** Trent Metal Employees Association (Applicant) v. Trent Metals Limited (Respondent) v. United Electrical, Radio and Machine Workers of America (UE) (Intervener).

Unit: "all hourly rated employees engaged in manufacturing, shipping, and truck drivers (excluding sales, office and supervisory staff) employed by Trent Metals Limited, in the City of Peterborough, Ontario, who serve the needs of industry in Central and Eastern Ontario." (62 employees in the unit). (*By agreement of the parties*).

**0641-79-R:** Labourers International Union of North America, Local 247 (Applicant) v. Francis Engineering Limited (Respondent). (19 employees).

**0707-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Evercrete Limited (Respondent). (16 employees).

**0850-79-R:** Local Union 221 – United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Cannon Incorporated (Respondent). (3 employees).



**0857-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar. B.Q. (Respondent). (60 employees).

**0898-79-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. United Parcel Service Canada Ltd. (Respondent) v. Group of Employees (Objectors). (39 employees).

### **Certification Dismissed Subsequent to Pre-Hearing Vote**

**1778-78-R:** Oil, Chemical and Atomic Workers International Union (Applicant) v. Wyeth Ltd./Ltee. (Respondent) v. Oil, Chemical & Atomic Workers Int'l. Union Local 9-368 (Intervener).

Voting Constituency: "All office and clerical employees of the respondent at Windsor, Ontario save and except supervisors, those above the rank of supervisor, the secretary to the general manager, the secretary to the director of personnel, laboratory technologists and chemists, temporary employees employed for not more than 89 working days in a 12 month period and employees covered by subsisting collective agreements with Local 9-368 (Plant Unit) Oil, Chemical and Atomic Workers International Union and Local 100 Canadian Union of Operating Engineers and General Workers." (51 employees).

Number of names of persons on list as originally prepared by employer		50
Number of person who cast ballots	47	
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	27	

**0734-79-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers: Local Union No. 304 (Applicant) v. American Express Canada, Inc. (Respondent).

Voting Constituency: "All office, clerical and technical employees of the respondent at 4 Lansing Square, Willowdale, Ontario, save and except supervisors, persons above the rank of supervisor, persons employed in a confidential capacity with respect to labour relations, two confidential secretaries to the vice-president and general manager and one confidential secretary to the vice-president of operations, sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (357 employees).

Number of names of persons on list as originally prepared by employer		347
Number of persons who cast ballots	329	
Number of segregated ballots cast by persons whose names do not appear on voters' list	9	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	100	
Number of ballots marked against applicant	219	

### **Certification Dismissed Subsequent to Post-Hearing Vote**

**0441-79-R:** United Garment Workers of America (Applicant) v. Harbourfront Corporation (Respondent) v. Group of Employees (Objectors).

Voting Constituency: "All employees of the respondent in Metropolitan Toronto, save and except

managerial personnel, persons above the rank of managerial personnel, the secretary to the general manager and the secretary to the Board of directors.” (99 employees).

Number of names of persons on revised voters' list		109
Number of persons who cast ballots		98
Ballots segregated and not counted	6	
Number of ballots marked in favour of applicant	37	
Number of ballots marked against applicant	55	

**0640-79-R:** United Plant Guard Workers of America, Local 1958 (Applicant) v. General Motors of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all security guards as defined in Section 11 of the Labour Relations Act of the Respondent’s transmission plant in Windsor, Ontario.” (14 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	12	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0448-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Morcam Group Limited E.C. King Contracting Limited Division (Respondent). (30 employees).

**0608-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Community Nursing Homes (Respondent). (5 employees).

**0609-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Community Nursing Homes (Respondent). (3 employees).

**0616-79-R:** United Brotherhood of Carpenters & Joiners of America Local 18 Hamilton, Ontario (Applicant) v. Milne Construction Co. (Respondent) v. Labourers’ International Union of North America, Local 506 (Intervener). (5 employees).

**0726-79-R:** The Canadian Union of Public Employees (Applicant) v. Parisien Manor Nursing Home (Respondent). (57 employees).

**0735-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 3054 (Applicant) v. Speidel a Division of Textron Canada Ltd. (Respondent). (25 employees).

**0774-79-R:** Labourers’ International Union of North America, Local 1059 (Applicant) v. W. C. Pietz Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener). (3 employees).

**0780-79-R:** United Brotherhood of Carpenters & Joiners of America (Applicant) v. Van-Horne Construction Ltd. (Respondent). (2 employees).

**0782-79-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. G. B. Wonder (Home Pride) Brampton (Respondent). (20 employees).

**0793-79-R:** United Steelworkers of America (Applicant) v. Metal Spray-On Limited (Respondent). (7 employees).

**0794-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Bruce S. Evans Ltd. (Respondent). (2 employees).

**0822-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Balazovic Excavating (Respondent). (6 employees).

**0823-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. E. H. Crow Construction Ltd. (Respondent). (11 employees).

**0860-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Turzillo Contracting Ltd. (Respondent). (4 employees).

**0868-79-R:** Office and Professional Employees International Union (Applicant) v. Master Mailers Limited (Respondent). (18 employees).

**0911-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Newman Brothers Limited (Respondent). (3 employees).

**0962-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. W. A. Stephenson Construction Co. Ltd. (Respondent). (6 employees).

## **APPLICATION UNDER SECTION 1(4)**

**1731-78-R:** Canadian Food and Allied Workers Local Unions 175 and 633 (Amalgamated Meat Cutters and Butcher Workmen of North America, affiliated with the AFL-CIO-CLC) (Applicant) v. Valdi Inc. (Respondent). (1 employee). (*Dismissed*).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**0006-78-R:** Gerard Lafortune (Applicant) v. Labourers International Union of North America, Local 493 (Respondent) v. Corporation of the Municipality of Casimir, Jennings, Appleby (Intervener). (7 employees). (*Dismissed*).

**0290-79-R:** Robert M. Earles and Other employees (Applicant) v. Retail Clerks Union, Local 206 chartered by the Retail Clerks International Union (Respondent). (*Granted*).

Unit: "all retail employees in Metropolitan Toronto and Ajax save and except for the store manager and persons above the rank of store manager, employed by Alexandra Park I.G.A. and Glen Agar I.G.A." (9 employees in the unit).



Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	11	
Number of ballots marked in favour of the respondent	2	
Number of ballots marked against the respondent	9	

**0716-79-R:** Sudbury Service Employees (Applicant) v. The International Association of Machinists and Aerospace Workers (Respondent). (3 employees). (*Dismissed*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**0649-79-U** Don Hearn & Sons Trucking Limited (Applicant) v. Greg Bezaire, et al. (Respondents). (*Dismissed*).

**0899-79-U** Martin Stewart Contracting Limited (Applicant) v. Royce Arnold (Respondent) v. Christian Labour Association of Canada (Intervener). (*Granted*).

**1003-79-U** Hickson-Langs Supply Company Limited (Applicant) v. Ton Albano, et al. (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

**0623-79-U** International Molders' and Allied Workers' Union, and its Local 279 (Applicant) v. Canada Valve Limited (Respondent). (*Dismissed*).

**0658-79-U** Ontario Nurses' Association (Applicant) v. The Grey-Owen Sound Health Unit (Respondent). (*Granted*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**0178-79-U** International Leather Goods, Plastics & Novelty Workers' Union, Local 8 (Applicant) v. Norseman Plastics Limited, Howart Walton, Allan Walton, John Bevilacqua (Respondents). (*Withdrawn*).

**0775-79-U** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Laidlaw Transportation Limited Michael DeGroot and Doug Gowland (Respondents). (*Dismissed*).

**0824-79-U** Labourers' International Union of North America, Local 837 (Applicant) v. Dynamic Circuits Corporation Limited, Proto Circuits and Fred Stocker (Respondents). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**1982-76-U** B. E. Kerber (Complainant) v. Douglas Aircraft of Canada Ltd., Local 1967 U.A.W. (Respondents). (*Dismissed*).

**0920-77-U** Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Flamboro Downs Holdings Ltd. (Respondent).

- and -

**1029-77-U** Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Flamboro Downs Holdings Ltd. (Respondent). (*Withdrawn*).

**1280-78-U** Dennis H. O'Keeffe (Complainant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880 (Respondent) v. Concrete Construction Supplies (Intervener). (*Dismissed*).

**2033-78-U** United Steelworkers of America (Complainant) v. Fotomat Canada Limited (Respondent). (*Withdrawn*).

**0333-79-U** Graphic Arts International Union, Local 35-P (Complainant) v. Toronto Star Newspapers Limited, Printing and Graphic Communications Union No. N-1 (Respondents). (*Granted*).

**0347-79-U** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Midland Auto Radiator Manufacturing Ltd. (Respondent). (*Granted*).

**0417-79-U** Laurentian University Faculty Association (Complainant) v. Laurentian University of Sudbury (Respondent). (*Granted*).

**0443-79-U** Ontario Nurses' Association (Complainant) v. Humber Memorial Hospital (Respondent). (*Dismissed*).

**0454-79-U** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Kafko Manufacturing Limited (Respondent). (*Withdrawn*).

**0460-79-U** Andre Hobelaide, Andrew Bettencourt, Sante DeCiantis, Leonardo DeCiantis (Complainant) v. Laborers' International Union of North America, and its Local 1089, Rocco D'Andrea and Orfeo Iacobelli (Respondents). (*Withdrawn*).

**0467-79-U** United Cement, Lime & Gypsum Workers International Union, AFL-CIO-CLC (Complainant) v. Westroc Industries Limited (Respondent). (*Withdrawn*).

**0533-79-U** International Union of Operating Engineers Local 796 (Complainant) v. The Cadillac Fairview Corporation Limited (Respondent). (*Dismissed*).

**0678-79-U** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Oxford House Tavern (Respondent). (*Withdrawn*).

**0694-79-U** United Garment Workers of America (Complainant) v. Deacon Brothers Limited (Respondent). (*Withdrawn*).

**0699-79-U** Ontario Taxi Association, Local 1688 Canadian Labour Congress (Complainant) v. Central Taxi Limited (Respondent). (*Withdrawn*).

**0710-79-U** Bob Orchard (Complainant) v. Kimco Steel Sales (Respondent). (*Withdrawn*).

**0714-79-U** International Beverage Dispensers' and Bartenders Union, Local 280 (Complainant) v. 388223 Ontario Limited carrying on business as Duffy's Tavern (Respondent). (*Withdrawn*).

**0738-79-U** The Canadian Union of Public Employees and its Local 27 (Complainant) v. The Windsor Board of Education (Respondent). (*Withdrawn*).

**0753-79-U** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Complainant) v. Bennett Foods Ltd. (Respondent). (*Withdrawn*).

**0776-79-U** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Laidlaw Transportation Limited Michael Degroot and Doug Gowland (Respondents). (*Dismissed*).

**0798-79-U** Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Union (Complainant) v. Robert Michaud Ltd. (Respondent). (*Withdrawn*).

**0814-79-U** Ontario Public Service Employees Union (Complainant) v. Vermay Enterprises Limited – Fergus District Ambulance-Royal City Ambulance (Respondent). (*Withdrawn*).

**0825-79-U** Labourers' International Union of North America, Local 837 (Complainant) v. Dynamic Circuits Corporation Limited, Proto Circuits and Fred Stocker (Respondents). (*Withdrawn*).

**0832-79-U** Goldcraft Printers Ltd. (Complainant) v. Toronto Typographical Union #91 (I.T.U.) and James Buller (Respondents). (*Withdrawn*).

**0836-79-U** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Niagara Ready-Mix Limited (Respondent). (*Withdrawn*).

**0838-79-U** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Kafko Manufacturing Limited (Respondent). (*Withdrawn*).

**0840-79-U** United Steelworkers of America (Complainant) v. Metal Spray-On Limited (Respondent). (*Withdrawn*).



## **APPLICATION UNDER SECTION 10 (RIGHT OF ACCESS)**

**0890-79-M** International Union of Operating Engineers, Local 793 (Applicant) v. E. E. Seegmiller Limited (Respondent). (*Withdrawn*).

## **APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0715-79-M** Zehrs Markets (A Division of Zehrmart Limited) (Employer) v. Retail Clerks Union, Local 1977 (Trade Union). (*Granted*).

## **APPLICATION UNDER THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82**

**0476-79-M** Ontario Public Service Employees Union (Trade Union) v. College of Applied Arts and Technology (Employer). (*Withdrawn*).

## **APPLICATION FOR DETERMINATION UNDER SECTION 95(2)**

**0391-79-M** The Corporation of the City of Kitchener (Applicant) v. Canadian Union of Public Employees Local 791 (Respondent). (*Dismissed*).

## **REFERENCE TO BOARD PURSUANT TO SECTION 96**

**0073-79-M:** The Labour Bureau of The Ontario Road Builders Association and of The Ontario Sewer and Watermain Contractors Association (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union). (*Granted*).

## **APPLICATIONS UNDER SECTION 112A**

**1918-78-M** Labourers' International Union of North America, Local 183 (Applicant) v. Adeline Construction Inc. (Respondent). (*Granted*).

**2002-78-M** International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and MacGregor Crane Service Limited (Respondents). (*Granted*).

**0657-79-M** Ontario Pipe Trades Council of the United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicants) v. The Mechanical Contractors' Association of Ontario, and Motor City Plumbing Limited (Respondents). (*Granted*).

**0664-79-M** The Sheet Metal Workers International Association Local Union 562 (Applicant) v. Sutherland Schultz Limited (Respondent). (*Dismissed*).

**0692-79-M** Chatham Construction Workers Association, Local No. 53, affiliated with Christian Labour Association of Canada (Applicant) v. Lapin Enterprises Ltd. (Respondent). (*Withdrawn*).

**0739-79-M** United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Dodge Construction Company Limited (Respondent). (*Withdrawn*).

**0767-79-M** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Impresa Masonry Ltd. (Respondent). (*Granted*).

**0784-79-M** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736 (Applicant) v. Ward Ironworkers Limited, 123 Victoria Street, Welland, Ontario, L3B 5R3 (Respondent). (*Withdrawn*).

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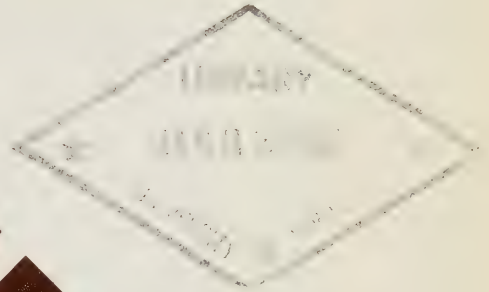




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**A Monthly Series of Decisions from the  
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**Cited [1979] OLRB REP.**

Selected decisions of particular reference value are  
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**0542-79-M** Barry Allen and Wayne Clearwater, Complainants, v.  
**Amalgamated Transit Union, Local 113**, Respondent.

**Financial Statements – Practice and Procedure – Whether Board requiring complainants to exhaust internal union procedure before entertaining complaint**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members M. J. Fenwick and L. Hemsworth.

**APPEARANCES:** *Brian A. Dunn for the complainants; Laurence C. Arnold and Charles Johnson for the respondent.*

**DECISION OF THE BOARD;** October 22, 1979

1. The complainants have complained pursuant to the provisions of section 76(2) of *The Labour Relations Act* that the audited financial statement furnished by the respondent union is inadequate.

2. Section 76(1) imposes a duty on unions to furnish any member, upon request, with a copy of an audited financial statement of its affairs to the end of its last fiscal year. In this case the complainants were provided with a financial statement but claim that the statement is inadequate because it is not sufficiently comprehensible to the ordinary union member.

3. Counsel for the union raised a preliminary objection relating to the timeliness of the complaint. Counsel recognized the Board's jurisdiction to hear the complaint but asked the Board to exercise its discretion to decline to do so until the complainants have exhausted their remedies under the union's constitution. Counsel referred the Board to Article 35.3 of the Constitution and General Laws of the Amalgamated Transit Union as well as a portion of the Obligation, an undertaking made by union members. They provide, respectively, as follows:

“The International Office may advise that an independant audit be made of the bills, books and accounts of any L.U. [Local Union] upon receipt of a petition signed by 5 per cent of the members who are in good standing in the L.U.

I will not appeal to any legal authority in matters pertaining to this Union until I have exhausted all means of redress provided by its laws.”

Counsel for the union contends that the combination of these provisions dictate that the complainants should try to obtain satisfaction through the union's internal procedures before complaining to the Board under section 76(2) of the Act.

4. An audited statement of the union's affairs as at December 31, 1977 was submitted to the Board. It is agreed between the parties that the auditor's report was prepared by an independent and reputable firm of chartered accountants in accordance with generally accepted accounting principles and in compliance with the standards of the Canadian Institute of Chartered Accountants. The complainants' concern is not that the auditor's report

was improperly done but that its lack of particularity and definition rendered it insufficiently comprehensible to the general membership and therefore inadequate under section 76(2). The complainants contend that the potential remedy under the constitution which the union asserts the complainants should pursue prior to coming to the Board is impractical and illusory and does not provide a viable alternative to section 76(2). In this regard counsel emphasizes that Article 35.3 stipulates that the petition contain the signatures of 5 per cent of the members, while a single individual can apply to the Board under section 76(2). He further notes that even if the petition is obtained the International Office is given the discretion to decide whether or not it will advise that the remedy be given. Finally, and in his view most importantly, he points out that even if a sufficient number of signatures are obtained on the petition and even if the International Office exercises its discretion in favour of the petitioners, the remedy envisioned by Article 35.3 is an independent audit which is something the complainants already have.

5. Both the Board and the courts apply the principle that union members who have committed themselves in contract with all other union members to exhaust their constitutional or internal remedies prior to appealing to an outside, legal authority should generally be required to do so. In *Wood, Wire and Metal Lathers' International Union et al. v. United Brotherhood of Carpenters and Joiners of America et al.*, (1973), 35 D.L.R. (3d) 714, for example, the Supreme Court of Canada ruled that in the face of a clear covenant not to resort to court proceedings without first exhausting internal remedies, an action in the courts to resolve a jurisdictional dispute was premature where the appellants had made no attempt to proceed in accordance with the internal mechanism specifically provided for the resolution of such matters. (See also *White et al. v. Kuzych*, [1951] 3 D.L.R. 641.) Courts have declined to require parties to exhaust internal remedies, however, where the original union action was not in accordance with established procedure (see *Orchard et al. v. Tunney*, [1957] S.C.R. 436 and *McRae v. Local 1720, The Cargo and Gangway Watchmen's Union of the Port of Saint John* [1953] 1 D.L.R. 327), was contrary to natural justice (see *Bimson v. Johnston*, (1957), 10 D.L.R. (2d) 11, and *Tippet et al. v. International Typographical Union, Local 226 et al.*, (1975), 63 D.L.R. (3d) 522) or where the internal machinery was unreasonable, impractical and ineffective (see *Gee v. Freeman et al.*, (1958), 16 D.L.R. (2d) 65).

6. It is well recognized that union members cannot, through their obligation to exhaust internal remedies, contract out of *The Labour Relations Act* or displace the Board's jurisdiction to hear a complaint filed under the Act. As a matter of discretion, however, the Board will normally defer to internal trade union procedures where satisfied that the machinery available is adequate, effective and will afford due process and natural justice (see *Canadian Textile and Chemical Union*, [1971] OLRB Rep. Aug. 469, *Imperial Tobacco*, [1974] OLRB Rep. July 418 and *Del-Mar Clothes Ltd.*, [1977] OLRB Rep. July 441). However, if the issue involves a violation of public policy, if the alternate remedy is illusory in that it provides inadequate relief or if the speed, economy and convenience of the internal remedy is not approximately equivalent to the remedy available through the Board, it is unlikely that the internal remedy would be deemed satisfactory so as to cause the Board to defer (see *Canadian Textile*, *supra*, *Imperial Tobacco*, *supra* and *General Impact Extrusions (Mfg) Ltd.*, [1972] OLRB Rep. Aug. 798).

7. In the Board's view the constitutional remedy proposed by counsel for the respondent union in this case is unduly time-consuming in comparison to the section 76(2) procedure. Not only does it require the circulation of a petition to obtain approximately 300 signa-

tures but also time for a subsequent decision by the International Office as to whether or not it will order that an independent audit be made. Of additional concern is the fact that the union was unable to give the Board an undertaking that if the complainants in fact produced a petition with the required number of signatures the International Office would either exercise its discretion to advise that an independent audit be made or that the audit, if ordered, would speak to the concerns of the complainants. In these circumstances, therefore, there is absolutely no assurance that the complainants would receive through the constitutional route anything other than the independent audit they already have. The substance of the complaint is not that the audit was not independent or done in accordance with accepted accounting principles. Mr. Allen's complaint is that the auditor's report is inadequate within the meaning of section 76(2) of *The Labour Relations Act* because of a lack of detail and clarity. The suggested remedy under the constitution does not speak to this aspect of the adequacy of the financial statement.

8. In these circumstances the Board views the constitutional remedy as illusory and impractical. The remedy suggested by the union is time-consuming, conditional on the favorable exercise of the International Office's discretion and, on its face, unresponsive to the substance of the instant complaint. Accordingly, the Board will forthwith hear the complaint.

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**1052-79-R** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Banvil Limited**, Respondent.

**Build-Up – Certification – Section 7a – Employer alleging build-up – Seeking deferred representation vote – Serious contraventions affecting employees' ability to disclose wishes by representation vote – Whether union has membership support adequate for bargaining.**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members D. B. Archer and W. Gibson.

**APPEARANCES:** Ken Petryshen and Don Swait for the applicant, G. Grossman and J. Goodis for the respondent.

**DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD AND BOARD MEMBER D. B. ARCHER;** October 22, 1979.

1. The applicant and the respondent are parties to an application for certification which included, amongst other issues, the request of the applicant that it be certified without a representation vote pursuant to section 7a of *The Labour Relations Act*. A hearing was held into the application by another panel of the Board which heard evidence and argument on all matters except the section 7a request, for which the hearing was to be continued on another date, if necessary. The Board scheduled the section 7a request for hearing together with a complaint filed by the applicant under section 79 of the Act before this panel which is



comprised of the same Vice-Chairman as the original panel and two other members. The section 79 complaint was withdrawn before the hearing and at the hearing the parties agreed to have the section 7a request heard by this panel.

2. At the times material to its application the applicant had sufficient membership support to be certified without a representation vote. The respondent, however, has alleged that the application is premature because a build-up of the work force is underway. That matter is before the other panel of the Board and the issue raises the prospect of a deferred representation vote being directed in keeping with the Board's policy on build-up if that circumstance is found to exist. It is this prospect which makes the applicant's request to invoke section 7a a relevant issue.

3. Respondent counsel had previously notified the Board that it would be requesting the Board to refuse to consider the applicant's allegations of employer misconduct on the grounds that the applicant had failed to comply with the duty of promptness under section 47(2) of the Board's Rules of Procedure. The Board received the submissions of the parties and concluded that, in the particular circumstances of this case, even if the applicant had failed to file its allegations promptly (and the Board makes no finding on this issue), there was no resulting prejudice, embarrassment or necessary delay or expense to the respondent. Consequently the applicant was allowed to adduce evidence on the allegations which it had filed with the Board.

4. The application for certification was filed with the Board on September 4, 1979 and the Board mailed to the respondent on September 6, 1979 the Board's customary notice to employees which the respondent is required to post on its premises. The notice was posted at 8:30 a.m. on September 12, 1979. The relevant facts which are set out hereafter are from the uncontradicted evidence of two witnesses, employees of the respondent, called by the applicant. The respondent did not call any witnesses. The facts relate to events which took place on September 11th and 12th.

5. Allan Hare, an assembler, was fired on September 11th. No reason was advanced in evidence for the termination of his employment, but he had been labelled by Dan Marcucci, Production Manager for the respondent, as the employee spearheading the organizing campaign. In absence of any evidence to the contrary and with no reason forthcoming from the respondent, it is not unreasonable to infer that Hare's dismissal was caused by his union activity. Furthermore, on the same day Marcucci asked an employee during a private discussion of another matter if she had been approached by Hare to sign a union card having first told her that he knew Hare had signed up two other girls. During the same discussion Marcucci told her that Hare had been fired. There is no evidence that she was told why Hare had been fired.

6. The next day the same employee and another one were interviewed separately and privately by Marcucci. They were asked if they would sign a petition to prevent the union from coming in and were told that, if the union did get in, assembly of the fans would be done elsewhere; the present premises would become a warehouse; and everyone, including Marcucci, would be out of a job. He told one of these employees that the fans would be assembled in Hong Kong and the other in the company's facility in Buffalo, New York. One of these employees, whose interview lasted some 15 minutes, observed employees entering and leaving Marcucci's office singly throughout most of the work day from approximately

9:00 a.m. This would allow sufficient time for the majority of the employees then employed to be interviewed. With no evidence to suggest otherwise, it is reasonable to infer that these employees also were asked if they would sign a petition and were told that they would be out of a job if the union came in because fan assembly would be done elsewhere. At about 3:30 p.m. the same day a meeting of all employees was called at which the employees were introduced to Mr. Goodis, the new General Manager of the respondent. He spoke in general terms about a number of matters concerning the operations of the respondent in Milton and in so doing stated that he wanted to see fan assembly continue there. Whatever result Goodis intended the latter remark to have, it served to increase the concern of one of the witnesses that it might be moved elsewhere.

7. Section 7a reads as follows:

“Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

Since this section was introduced to the Act by the 1975 amendments, the Board has heard and decided a significant number of requests under the section to certify applicant trade unions without a representation vote. These decisions of the Board deal with a wide range of circumstances, nonetheless they make it clear that each case was determined on its own facts and certification under the section was granted only if the facts established the presence of three conditions:

- (a) The respondent must have contravened the Act.
- (b) The contravention must have resulted in a situation where a secret ballot would not likely ascertain the true wishes of the employees.
- (c) The applicant must have membership support, in the bargaining unit which the Board has found to be appropriate, adequate for collective bargaining purposes.

The Board’s decision in *Ex-Cell-O-Wildex*, [1977] OLRB Rep. July 466 paragraphs 14 through 20 reviews the place of section 7a in the scheme of the certification procedures of the Act and the nature of the criteria which the Board has followed in establishing the existence of the three prerequisite conditions.

8. The facts in this case leave no room for doubt that the respondent employer has contravened the Act. Upon these facts, the actions of Marcucci, a representative of management, are a clear violation of the section 56 prohibition of employer interference with the selection of a trade union. Marcucci’s actions in our view also constitute a violation of the prohibition in section 58(c) against the intentional use of intimidation “to compel an employee

to become or refrain from becoming or to continue to be or cease to be a member ... of a trade union ...". The day before respondent posted the Board's notice to the employees about the application, Marcucci, in the course of asking an employee if Hare had asked her to sign a union card, told her that Hare had been fired. There is no evidence that he told her what the reason for dismissal was. The day following the firing of Hare and the day on which the Board's notice was posted, Marcucci interviewed a majority of the employees. He indicated to them the employer's desire not to have a union by asking them to sign a petition to keep out the union, at the same time telling them that, if the union gets in, they might all be out of jobs. The intent of these remarks was quite clearly to discourage employee support for the applicant. This is not only a violation of section 58(c) but also of section 61. The Board is not prepared to attach similar intent to Goodis' remarks about wanting to keep fan assembly in Milton, but neither is it prepared to view them, as respondent counsel suggested, as having the affect of allaying the fears raised by Marcucci's remarks. Thus we are left with an unretracted, clear threat to employees' job security which is directed at their attempts to be represented by a trade union of their choice.

9. Marcucci's remarks also contained a clear message: if the union gets in, employees' jobs go out. Therefore, were the Board to direct a vote as a result of a finding of build-up in this case, the prospect facing the employees would be that a vote for the applicant would be a vote for the loss of all of their jobs.

10. Considering the nature of these violations (even though the employer's actions have been confined to a period of two days), the Board determines that the wishes of the employees who were in the employment of the respondent at the time of the unlawful events are not likely to be ascertained by a representation vote. The Board is asked by the respondent counsel, however, to have regard to the build-up issue before the other panel. He contends that, should a representation vote be directed for some later date as a result of a finding that there is a build-up, by that date the employees who were allegedly tainted by the unlawful offences would be outnumbered by new employees, particularly if account was given also to the effect of normal labour turnover. Having regard to the nature of the offences, we are of the view that their impact on employees present at that time would carry over to the new employees and still prevent the employees' wishes from being ascertained by a vote.

11. Counsel for the respondent asked the Board to have regard to the build-up issue also in forming its opinion as to whether the applicant has membership support adequate for the purposes of collective bargaining; the final condition to be found if the applicant is to be certified without a representation vote. He asked the Board to consider the rationale underlying its build-up policy, that is to allow future employees a voice in selecting their bargaining agent, and an opportunity to speak for themselves in a representation vote. The clear inference from counsel's argument is that the build-up situation, because of the changing nature of the work force, obscures the Board's opportunity to form its opinion as to membership support. Whenever the Board is required by the Act to determine membership support, section 92(2) (j) gives the Board the authority to determine the form in which and the time as of which evidence of membership shall be presented. In a variety of situations the Board has used the terminal date of the application with which it is dealing as the time for determining membership support. Therefore, in all of the circumstances of this case, for the purpose of forming its opinion as of the date of hearing this matter, the Board selects the terminal date pursuant to section 92(2) (j) of the Act to be the time as of which membership



support is to be considered in order to determine whether the applicant has membership support adequate for the purposes of collective bargaining. In this respect, the other panel of the Board in its decision issued October 18, 1979, found the bargaining unit described below to be a unit of employees appropriate for collective bargaining purposes. It found also that more than fifty-five per cent of the employees of the respondent in that unit as at the application date were members of the applicant on the terminal date. The bargaining unit is:

“All employees of the respondent at Milton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period.”

The Board, therefore, is of the opinion that the applicant has membership support adequate for collective bargaining purposes.

12. Having regard to all of the circumstances of this case, the Board considers it an appropriate one in which to exercise its discretion under section 7a and grant the applicant's request for certification without holding a representation vote regardless of the alleged build-up.

13. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER W. GIBSON:**

1. The foreman at the company, Mr. Marcucci, was involved in attempting to instigate an anti-union petition, and had this petition been presented to the Board, the majority of the Board would no doubt have rejected the petition because of the circumstances surrounding its preparation and circulation.

2. However, the issue in this case does not involve a petition but involves an application under Section 7a of the Act. Here, neither Mr. Marcucci, nor any other company official had conversations with the employees relating to the union organizing campaign, other than on September 11th or September 12th. Mr. Goodis, the General Manager of the company, late on September 12th called all the employees together to correct any misapprehensions that they might have had because of Mr. Marcucci's comments. Mr. Goodis told the employees that they are working in a new plant and that he and the company wanted to remain in business in that plant. In my view, it is obvious that employees knew from the major investment that the company had made in equipment and buildings that the company was not going to close the plant and move elsewhere.

3. The circumstances surrounding the firing of Mr. Hare are not clear. Neither party called evidence as to the real reasons for this discharge, and the motivation for his discharge is thus left open to conjecture.

4. Even if the company had violated the Act in its dismissal of Mr. Hare, the Board must still determine whether the true wishes of the employees cannot be ascertained by a representation vote. In this case, the Board received firm evidence of a build-up of employees. The company adduced evidence which demonstrated that there were 9 employees in July, 21 employees on the date of application, 34 employees on the date of the hearing, and

that there would be a further build-up in the number of employees by November to more than double the number which were employed on the date of application.

5. I disagree with the majority in its conclusion that the true wishes of the employees cannot now be ascertained by a representation vote. I do not understand how the majority of the Board can conclude that the wishes of the additional employees hired since the date of application can be affected by the remarks made by a foreman on September 11th and September 12th, which were later retracted by the General Manager of the company.

6. In my opinion, the majority of the Board is placing undue emphasis upon conduct which might have affected the employees at the time it took place. The effect of the employer's conduct is diminished with the passage of time, and that factor taken together with the presence of new employees who could not have been affected by the employer's conduct, since they were not there at the time, must lead to the conclusion that the true wishes of the employees can be ascertained by a representation vote.

7. For these reasons, I would order a representation vote when the Board's criteria for build-up are satisfied, and I believe that, at that time, the true wishes of the employees with respect to union representation will be demonstrated by a secret ballot.

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**0645-79-M** Local 636, International Brotherhood of Electrical Workers, Trade Union, v. **Caledon Hydro-Electric Commission**, Employer

**Employee – Section 95(2) – Managerial defined – Effective recommendation test reviewed**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members F. W. Murray and O. Hodges.

**DECISION OF THE BOARD;** October 25, 1979

1. This is an application under section 95(2) of *The Labour Relations Act* in which the applicant seeks a determination concerning the employee status of Mr. Ralph Thompson, a recently hired "working foreman." The relevant provision of the Act is as follows:

"1(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."

2. The purpose of the managerial exclusion has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] Can LRBR 3:

“The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for ‘cause’ or passed over for promotion on the grounds of their ‘ability’. The employer does not want management’s identification in the activities of the employee’s union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm’s length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.”

3. Because the Act does not contain a definition of the term “managerial functions” the task of developing criteria, which can identify members of management, has fallen to the Board and, in recognition of the fact that the exercise of managerial functions can assume



different forms, in different work settings, the Board has evolved a number of “tests” to assist it in its enquiry. However, there are no magic formulae or rules of thumb which are universally applicable and dictate the result in every situation. The Board has consistently held that it must have due regard to the nature of the industry, the nature of the particular business, and the employer’s organizational scheme. Essentially the determination is a factual one, but the Board must always bear in mind that the purpose of its enquiry is to determine whether the functions of the challenged individual are such that his inclusion in the bargaining unit would be incompatible with collective bargaining. In the case of so-called “first line” managerial employees the important question is whether the individual can fundamentally affect the economic lives of his fellow employees so that he is inevitably put in a position that creates a conflict of interest with them. The right to hire, fire, promote, demote or discipline employees are manifestations of managerial authority and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit.

4. In each case the Board must determine the nature of the individual’s authority, and the extent to which that authority is actually exercised. It is not sufficient that the powers are contained in a job description, or that an employee has a “managerial” job title. “Managerial functions” must be actually exercised. It is recognized, of course, that if the position is a newly created one, or if the incumbent has been recently appointed, it may be that occasions have yet to arise where certain powers are used. If such is the case it may be that the request to the Board is premature. Moreover, as the Board noted in *Transit Windsor*, [1979]OLRB Rep. Mar. 262, organizations and systems of management can change. Over time the degree and focus of decision making power can be altered. However, the Board is restricted in its determination to the situation, as it exists, on the day of application, not as it might become some time later.

5. In view of the disposition which we consider appropriate in this case, it is unnecessary for us to engage in an extensive analysis of the Board jurisprudence or to multiply the number of case references. We do not wish to leave the matter, however, without giving the parties some guidance as to the principles which the Board generally applies.

6. The word “manager” connotes a person who has effective control over an organization which, in turn, suggests an intrinsic responsibility that would manifest itself in a form of independent decision making. This approach emphasizes both the *degree of independent discretion* and the *nature of the decisions actually made*. On this view there is a significant difference between recommending, or influencing, a decision and actually making it. If a person is merely implementing a decision, made by another, and has little latitude to use any independent discretion except in predetermined, circumscribed areas, such a person cannot be said to be exercising managerial functions. In addition, managerial persons often rely on the expertise, powers of observation or good judgment of senior employees. These employees often possess technical knowledge, skills or experience which is valuable to the organization, but the fact that management may act on the advice of such persons does not change the nature of the functions exercised by them. As the Board noted in *Hydro Electric Power Commission of Ontario*, [1969] OLRB Rep. Aug. 669:

“The fact that an expert employee may recommend a course of action which a member of management might decide to follow does not, of itself, make the employee’s recommendation a managerial function. Al-

though a recommendation may be the basis of the decision taken, however, it is the decision to implement the recommendation which can be correctly described as the managerial function.”

An employee must be more than a mere conduit of information, or even recommendations, to his superiors. Such recommendations must not only affect the “economic destiny” of his fellow employees, but they must also be so frequently forthcoming, and consistently followed, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this kind of “recommendation” which the Board has characterized as an “effective recommendation.” The Board must be especially careful in relying upon an “effective recommendation” test in situations where the subject individual clearly has no *independent* decision making power. The problems raised by a loose application of such a “test” are aptly stated in *British Columbia Telephone Company*, (1976), 76 CLLC ¶16,015, at page 467:

“In the past, certain labour relations boards have accepted that the existence of a power to “effectively recommend” hirings, dismissals or disciplinary action was an index of the performance of management functions almost as important as the actual making of such decisions. This raised many problems not the least of which was the instant multiplication of the number of managers. Another one was, of course, the determination of how “effective” recommendations have to be and how often before it can be reasonably inferred that there truly exists a power to recommend effectively.”

7. Modern corporations encourage the free flow of information and ideas from subordinates to superiors. Consultation, and involvement in the decision making process, improves communication in both directions, clarifies the employer’s problems and objectives, increases employee morale and makes optimum use of employee ingenuity and creativity. “Participatory management styles” have become a prevalent technique in large organizations for reducing employee alienation, and increasing commitment to the goals of the employer. (See generally P. Blumberg, *Industrial Democracy: The Sociology of Participation*, Constable, London, 1968.) In small organizations consultation is inevitable because of the small number of individuals who must work together effectively if the goals of the organization are to be accomplished. One should not conclude, however, that the existence of consultation and an apparent “democratization” of decision making means that managerial authority has begun to percolate downwards. In the *B.C. Telephone* case, *supra*, the Canada Labour Relations Board came to precisely the opposite conclusion. In the present case it is contended that some of Mr. Thompson’s functions are “managerial” and some are not. The situation of persons who exercise effective control or authority over others, but who also perform bargaining unit work, was discussed by the Board in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379:

“Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board’s difficult task to determine whether the

additional responsibilities are managerial functions within the meaning of section 1(3) (b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit.) If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instruction from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3) (b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall* case above referred to, titles alone are not much assistance in determining what a person's functions really are.

While the cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3) (b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining."

8. It is often difficult to distinguish the kind of effective control or authority exercised by "managerial" employees from that exercised by persons who merely co-ordinate the work of others. Where numbers of people work at a common enterprise they need to have their efforts co-ordinated and, therefore, many persons may be engaged in co-ordinating activities. Co-ordination *per se* is not a managerial activity, and may become very routine because of the enactment of rules and policies to channel working energies with the maximum certainty and efficiency. Persons who exercise craft skills which have been acquired through years of training or experience will necessarily exercise a considerable influence over less experienced "journeymen" apprentices, and associated non-craft employees. Experienced craftsmen commonly supervise the work of those who are less experienced and it is part of their normal job function to train and direct such persons and to instill good work habits. The existence of mixed crews of skilled and non-skilled employees is explicitly recognized by section 6(2) of the Act, which is an exception to the usual rule which



entitles craft employees to their own separate bargaining unit. The section is designed to accommodate situations in which fully skilled and less skilled, or unskilled, employees will work together as a unified work group. In such circumstances it is inevitable that the most skilled employees will have a special place on the “team” and will have a role to play in co-ordinating and directing the work of the other employees. It is only the most skilled employees who fully understand the technical requirements of the job and the tools and materials required. It is they who must allocate the work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In the construction industry where one finds the greatest concentration of skilled employees (electricians, carpenters, etc.) the Board has drawn a distinction between working and non-working foremen. An analogous distinction in the industrial context is drawn between a “lead hand” and a “first line foreman.” The difference between these groups lies not in their power to control, direct, supervise and co-ordinate the work of other employees. The important question is whether the individual can effect the economic lives of other employees so that he is put in a position that creates a conflict of interest incompatible with membership in the bargaining unit.

9. There is no magic number which defines the appropriate ratio of managerial to non-managerial employees (or as counsel occasionally put it: “the ratio of chiefs to indians.”) The managerial structure is largely determined by the industry and the nature of the work. However, if the bargaining unit is very small, or largely self directed, a heavy onus lies upon any party asserting an additional managerial exclusion – especially when such managerial function has no historical basis and there is no apparent change in the employer’s organization or the work requirements which would justify the creation of a new level of management. On the other hand the Board has been unwilling to accept the submission that large numbers of employees carry out their day-to-day activities without “managerial” supervision or control. In *Transit Windsor*, *supra*, for example, the Board did not accept the submission that 140 bus drivers worked without any “field” supervision or that managerial responsibilities were exercised only by persons located in the company’s office.

10. Finally, it might be observed that the Board is not unaware of the collective bargaining ramifications of its decisions, or their effect on the parties’ relative bargaining power. It is not unusual for trade unions, or employers, to try to achieve a collective bargaining advantage by asserting that an individual or a job category is, or is not, “managerial.” This merely complicates the Board’s task, for each party will attempt to categorise the relationship or elicit responses from its witnesses which accord with the earlier pronouncements of this Board. This often explains the statements of otherwise lucid and straight forward witnesses or documents which, apparently coincidentally, use the very language which the Board has used in previous decisions.

11. We turn now to the facts of the present case. Mr. Thompson was employed on March 6, 1979 and became a “foreman” on or about June 8th. It was not until about July 5th, however, that he was presented with a formal job description listing his duties and responsibilities. It is not insignificant that it was on July 5th that the trade union made the present application.

12. Mr. Thompson works in a crew together with three other permanent employees and a student employed during the school vacation. There is one other fully qualified journeyman in addition to Mr. Thompson, one “fourth year” tradesman and one “second year” tradesman. Mr. Thompson indicated that the other fully experienced journeyman is essen-

tial to the group and in his absence Mr. Thompson performs his duties. Similarly, when Mr. Thompson is away, he fills in for Mr. Thompson. At least 50% of Mr. Thompson's time is spent working at his trade with the other members of the crew. Indeed (although the evidence is not entirely clear on this point) it would appear that when Thompson is performing functions which are characterized as "supervisory" he may at the same time be doing other work in or about the job site.

13. It is the respondent's contention Mr. Thompson is a "foreman" and that the three other employees (and the student) are his subordinates. There is, however, virtually no evidence that Mr. Thompson exercises any authority over them or, in fact, performs any functions markedly different from those which were apparently performed by his predecessor, who was regarded as a "lead hand."

14. There is no evidence of any extensive discussion of Mr. Thompson's duties and responsibilities prior to his promotion to the position of foreman, nor is he very clear as to the present extent of his authority or the true import of the statements in his job description, which purportedly describe his powers. He has never hired, fired or disciplined anyone, nor has he made any such recommendations. On a recent occasion, when discipline might have been called for, he did not consider it his responsibility and merely reported the incident to Mr. Smillie, his superior. He has never granted casual time off or authorized an overtime shift, and again felt that in both cases this was a matter that he should report to Mr. Smillie. Mr. Thompson testified that he would report any complaints or personnel problems directly to Mr. Smillie and that he did not anticipate being involved in the grievance procedure. Despite the terms of his job description Mr. Thompson was unclear as to the significance or mechanics of the grievance-arbitration process or his position in that process. He indicated that he was not aware that he was expected to make reports on his fellow employees, but indicated that if that were the case, he would make a written report to Mr. Smillie and would not take direct action himself. He has not, in fact, made any evaluation of the work performance of his fellow employees, including the junior employees who are still learning the trade.

15. The scheduling and the lay-out of the work to be done is performed by Mr. Smillie who sets the work schedule and indicates the target times for completion. The evidence is not entirely clear on this matter, but it appears that the tasks to be done are governed by the need to meet problems as they arise or maintain a pre-established maintenance programme. Consultation with the employees who actually do the work is a necessary process. Mr. Thompson testified that many of the Commission's policies and practices are already predetermined, including the assignment of personnel to vehicles, the maintenance of tools and equipment, etc. These he characterized as the responsibility of all tradesmen. Likewise, the estimation of material required is done together with his crew members and is subsequently submitted to Mr. Smillie. Such estimation depends upon Mr. Thompson's trade skills and experience together with that of his fellow employees. When Mr. Thompson is absent he testified that these functions would be performed by the other fully qualified journeymen. He has never participated in the employer's "budget making" process in a general sense, but characterized the kind of input which he had concerning work methods and materials as one which was natural for any experienced journeyman. He has no clear idea of his authority to commit the respondent to expenditures of funds. Finally, Mr. Thompson testified that Mr. Smillie is personally on the job site quite often directing the work of the crew.

16. It is unnecessary to speculate as to the result if Mr. Thompson regularly per-

formed the functions set out in his job description and clearly demonstrated a degree of authority of decision making power which was *independent* of that of his own superior. Those are simply not the facts before us. Having regard to the totality of the evidence we are satisfied that Mr. Thompson does not exercise managerial functions within the meaning of section 1(3) (b) of the Act.

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**1031-79-U United Garment Workers of America, Complainant, v. Deacon Brothers Limited, Respondent.**

**Charges – Change in Working Conditions – Discharge for Union Activity – Company implementing lay-off following departmental seniority and skill and ability – Employer advising union of impending action – No anti-union motive**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members M. J. Fenwick and F. W. Murray.

**APPEARANCES:** *A. Bekerman and Paul Facey for the applicant; S. D. Bowman and F. B. Deacon for the respondent.*

**DECISION OF THE BOARD; October 12, 1979**

1. This is an application under section 79 of *The Labour Relations Act* in which the trade union alleges a violation of sections 56, 58 and 70 of the Act.

2. The respondent company is a clothing manufacturer in the City of Belleville and employs approximately eighty-five employees. The applicant trade union was certified to represent those employees on July 18th, 1979. On or about August 24th, 1979 the grievors were laid off. It is this lay-off which gives rise to the present complaint.

3. All of the grievors are employed in the respondent's shirt department. By the early summer of 1979 the respondent reached the conclusion that its production target of one-hundred-thousand units was over optimistic. This production target had been formulated the previous year on the basis of anticipated sales but by early summer it became evident that it was no longer a realistic estimate of customer demand. Apparently the increase in price, which became necessary following the devaluation of the Canadian dollar (and the consequent increase in the price of cloth imported from Britain), was meeting with considerable consumer resistance and advance sales were down some eighteen-thousand units from the previous year. The expected retail demand – especially for Christmas – had simply not materialized.

4. Having regard to the weakening market for its product, the respondent decided that it was necessary to cut back production. At its then existing rate of production the shirt department would have exceeded its production target and produced thousands of units for which there was no ready market. The respondent considered two possible courses of action: a complete shutdown of the shirt department for perhaps a month or a reduced level of



production for three or four months. The respondent considered the possibility of attrition, but it did not appear that this would provide a solution. Expected employee turn-over was minimal.

5. Of the forty employees in the department the respondent decided that nine or ten should be laid off. In determining which individuals should be laid off the respondent considered the employees' departmental seniority and their ability to do the various jobs. With minor exceptions the junior employees in the department were laid off. The exceptions involved individuals who the respondent concluded were better able to do their particular job than more senior employees.

6. The criteria considered by the company in this particular lay-off (i.e., departmental seniority and ability) have been considered in past lay-offs. Indeed, this method was provided in a collective agreement between the company and the previous bargaining agent. Although in recent years there has been no collective bargaining relationship, the respondent has consistently followed this practice. Moreover, the company brought the lay-off problem to the union's attention at the bargaining table prior to announcing the lay-off to the employees. Fred Deacon, the president and general manager of the respondent testified that the company had not instituted the lay-off when the problem first became apparent because there was then an application for certification pending and he did not wish to risk disrupting the bargaining relationship at that early stage. In his view it would have been bargaining in bad faith to unilaterally impose a lay-off prior to bargaining, and it was for this reason that he brought the matter to the bargaining table. The company correctly foresaw the union's concern – not least because two of the employees who would be laid off were on the bargaining committee and the issue of departmental seniority might very well be a bargaining issue.

7. The issue before this Board is whether the respondent's conduct was motivated, in whole or in part, by an anti-union animus. Having carefully reviewed the evidence, we are unanimously of the view that it was not. The company followed its policy of applying departmental seniority, as it had in the past. There is nothing illegal in this, nor is there one shred of evidence that the lay-off itself, or the selection of the individuals to be laid off, was influenced by the presence of the union or the union activity of any of the employees. It is not for this Board to say whether departmental seniority, plant-wide seniority, or any other form of employee selection process is the most appropriate one for the respondent to apply. That is a matter for joint negotiation between the company and the union, as it was when the previous bargaining agent agreed to the scheme which the company has subsequently followed. The complaint must, therefore, be dismissed. However, we do not wish to leave this matter without noting that had the company been more willing to patiently explain the employee selection process, as it did to this Board, and had the trade union been more willing to listen to such explanation rather than come to the Board with charges of illegal conduct, which proved to be without foundation, the litigation with which we are here concerned could have been avoided. Litigation is seldom a satisfactory means of furthering a constructive collective bargaining relationship, and it is singularly inappropriate, in the early stages of that relationship, when compromise and accommodation are most necessary.

8. Accordingly the complaint is dismissed.

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**0879-79-U** Michael Robert Reeder, Complainant, v. **De Havilland Aircraft of Canada Limited** and Local 112, United Automobile, Aerospace and Agricultural Implement Workers of America, Respondents.

**Duty of Fair Representation – Union refusing to pursue discharge grievance – Seeking unsuccessfully to negotiate reinstatement with company – Whether conduct “arbitrary” – Arbitrary defined**

**BEFORE:** E. Norris Davis, Vice-Chairman

**APPEARANCES:** *M. F. Smith for the complainant; D. Churchill-Smith, J. A. Roffey and W. J. Easdale for De Havilland Aircraft of Canada Limited; L. Sheffe, J. Bettes, D. Spalding, K. McCauley and N. Smart for respondent union.*

**DECISION OF THE BOARD;** October 16, 1979

1. The complainant is alleging that the respondent union contravened section 60 of *The Labour Relations Act* in representing him in respect to his discharge from employment with the intervening employer.

2. In its pleadings the complainant alleged that the intervener had contravened section 37 of the Act in that it had through its Industrial Relations Manager refused to accept a grievance on the grounds that it was untimely under the collective agreement. The Board was of the view that section 37 is procedural only and does not create any offence and the Board made an oral ruling that it would not hear evidence relating to the matter.

3. The complainant, Michael Reeder was employed by De Havilland Aircraft Co. Ltd. on September 19, 1977 and was discharged by letter June 2, 1978, his last day of work having been May 27, 1978. The letter of discharge states:

“Despite previous verbal and written warnings for attendance and a subsequent one day suspension, you are again absent and for a reason totally unacceptable to the Company. Effective this date June 2, 1978 your employment has been terminated as an unsatisfactory employee.

You will be required to clear your tools through stores so that the necessary paperwork and any monies due to you can be processed.”

4. Reeder testified that on May 29, 1978 he was convicted of an offence for driving while under the influence of alcohol, and it being his second offence within 4½ years he received a mandatory 14-day sentence. He states that his lawyer sought permission for him to serve the sentence on weekends which was denied but was granted permission to avail himself of the “Temporary Absence Program” which would permit him to be released from jail daily for the sole purpose of attending his place of employment. Reeder stated that he was taken directly from the Court on May 29, 1978 to the Scarborough Detention Centre, where he talked to one Forrester, who was in charge of the Temporary Absence Program. Reeder supplied Forrester with the name of his employer, name of his foreman, payroll number and employer’s phone number, and Forrester stated that he would phone the company immediately to verify his employment. Forrester did not return to Reeder that day, but according to

Reeder at some time Forrester told him that he had spoken to Reeder's foreman who had informed him he didn't know if a Michael Reeder was employed by the company and that the foreman would have to check with someone higher up and call back, and no such call-back was received. Reeder served his 14-day sentence without participating in the Temporary Absence Program.

5. Reeder stated that, on his release, he became aware for the first time of the letter of June 2nd which had been sent to his parents' address, and on June 12th he talked with David Spalding, Union Plant Chairman and advised him he had been discharged. Spalding, according to Reeder, did not appear to have any prior knowledge of Reeder's situation. Reeder informed Spalding that the company had been contacted and informed of his whereabouts during his absence. Spalding stated he would contact Locke Reid, Personnel Manager to "see what was going on", and Reeder asked Spalding to arrange for him to see Reid in order that he could explain the situation. Spalding absented himself for 10-15 minutes. On his return he advised Reeder that Reid refused to discuss the situation, that "it was done and that was that". Spalding suggested Reeder speak with John Bettes, Union President to see if there was "anything we could do", and Reeder states he spoke with Bettes two days later.

6. Reeder states that on June 12th he also talked with his foreman, Parrott and asked him why he hadn't returned the phone call from Forrester and if he realized that as a result Reeder was unable to leave jail. Parrott is said to have acknowledged the phone call from Forrester and that he had told Forrester that "he was not sure a Michael Reeder was working there and that he would have to check with someone higher up". In respect to not calling Forrester back Parrott stated "I forgot".

7. On June 13 or 14th Reeder spoke with Bettes and explained his situation again, and asked if he could file a grievance. Bettes replied that he would have to find out more about it first. Sometime later Reeder phoned Bettes and learned Bettes had spoken with Reid whose position was that Reeder had been fired for non-attendance and since no grievance has been filed within the five-day period specified in the contract, he would not reconsider the matter. Bettes also stated that he'd try to keep talking to Reid and try to bring him around but there was no use putting in a grievance since the company was taking the position that it was beyond the time limits. Shortly after this a protracted legal strike of four months' duration occurred.

8. Reeder acknowledges that he was treated courteously by Spalding and Bettes and that Bettes did speak with Reid several times on his behalf. Sometime in December Bettes informed Reeder that he and Spalding had recently talked to Reid again and that they had tried everything they could and didn't feel they could do any more. Bettes advised Reeder to go and see Reid, that it was his "last chance to talk him out of it".

9. Reeder testified that as a result he had a three hour meeting with Reid on January 3, 1979 and they discussed Reeder's points and Reid's points but that in the ultimate Reid's position was that he had the final word. Reeder was not accompanied by any union representative at this meeting nor had he requested to be. No evidence was led that Reeder had any further contact with the union or its officials following this meeting, and on January 5th, 1979 he sought legal advice.

10. The complainant alleges that the union failed "to submit a grievance on behalf of



the complainant against the complainant's discharge ... and further did fail to take steps necessary to require the respondent, De Havilland to accept the grievance ... and to proceed to arbitration".

11. There was no evidence from which the Board would be justified in drawing an inference that the respondent had acted discriminatorily or in bad faith towards the complainant, and if the complaint is to be sustained the Board must conclude that the respondent's conduct in handling Reeder's grievance was of an arbitrary nature. The complainant argues that section 37(5a) of the Act empowers an arbitrator, under certain circumstances, to relieve against grievance processing time limits in a collective agreement and the failure of the union to pursue this avenue in order that the merits of the grievance could be tested in arbitration, in itself, justifies an inference of arbitrary conduct.

12. The evidence was clear that the union cannot be charged with any degree of culpability in respect to not filing an original grievance in respect to Reeder's discharge within the contractual period prescribed of three days following written notice to the employee. On Reeder's own evidence his first contact with the union was on June 12th (at which time the three day limit was well passed). The efforts of both Spalding and of Bettes in seeking to negotiate a re-instatement for Reeder can only be construed as the antithesis of arbitrary conduct. The narrow issue before the Board therefore is whether the union's failure to seek arbitration in the hope that the arbitrator would remove the "untimely" barrier and hear the matter on its merits, can be construed as a contravention of section 60 of the Act.

13. It is clear to us that up to the meeting of January 3, 1979 between Reeder and Reid, it was the opinion of union officials that the favorable settlement of Reeder's complaint was most likely to be secured, if at all, through negotiation with Reid, the Personnel Manager and not by filing a written grievance. The evidence was that union representatives met several times with Reid to this end. The evidence of Reeder was that he apparently shared this view of how the matter should be dealt with, and as early as Reeder's first meeting with Spalding Reeder asked Spalding "to get Reid to let me explain"; Reeder's evidence also was that he made many telephone attempts to talk with Reid to this end, but unsuccessfully. It was thus that matters stood in late December when Spalding and Bettes advised Reeder they had had a further (and in their view, final) unsuccessful discussion with Reid but had secured for Reeder an opportunity to meet with Reid and the three hour meeting of January 3rd took place, following which Reeder sought legal advice.

14. The jurisprudence of the Board is clear that where a union official refuses to put his mind to the issue before him or is grossly negligent almost to the point of recklessly or wilfully failing to consider all aspects of the problem, his conduct will be characterized as arbitrary. No evidence was led in the instant case as to whether or not Bettes, in reaching the initial conclusion that there was "no use" in filing a written grievance because of the time limit expiry considered the probable outcome of such a grievance in the light of section 37(5a) of the Act, or whether Bettes was in actual fact aware of that section.

15. It is the complainant's position that since section 37(5a) of *The Labour Relations Act* empowers an arbitrator to relieve against contractual grievance processing time limits under certain circumstances, the failure of the union to file a formal grievance on Reeder's behalf and thus test whether the matter would be heard on its merits was on its face arbitrary conduct. In other words, the complainant contends that the union's decision to not file a for-

mal grievance in the face of the company position that such a grievance would be out of time according to the contract and to proceed instead by way of negotiation outside the formal grievance procedure must be viewed as an arbitrary act.

16. The precise meaning to be ascribed to arbitrary representation was canvassed at length by the Board in the *Walter Prinesdomu* case [1975] OLRB Rep. May 444 and again in the *Jay Sussman* [1976] OLRB Rep. July 349. Of particular assistance in the instant case is the following from paragraph 25 of the *Walter Prinesdomu* case where it is said,

“... Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word ‘arbitrary’ with the word ‘perfunctory’ and observed that a trade union, ‘in a non-arbitrary manner [must] make a decision as to the merits of particular grievances.’ It could be said that this description of the duty requires the exclusive bargaining agent to put ‘its mind’ to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.”

and further in the same decision at paragraph 26:

“This gives the word arbitrary some independent meaning beyond subjective ill-will, but at the same time it lacks any precise parameters and thus it is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes or unbecoming laxness.”

and further in the same case:

“... An approach to a grievance may be wrong or a provision inadvertently overlooked and Section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision maker ascertained the Board may decide that a cause of conduct is so implausible, so summary or so reckless to be unworthy of protection ...”

17. In the instant case it was Bettes’ decision after investigating the matter and after discussions with a company official that the best avenue to pursue was not the formal grievance procedure but rather to attempt to secure a favourable resolution of the problem through discussion and persuasion. That both Bettes and Spalding pursued this avenue vigorously was evident from Reeder’s testimony. Whether the matter could have been more successfully pursued in the formal grievance procedure and arbitration was a judgment call and one which could have gone either way. Having regard to the fact that it was by no means certain that an arbitrator would relieve against the time limits, or if he did what his view might be of the merits of the case, this Board cannot conclude that the course of conduct adopted was in any way an unreasonable or implausible one. In our view, and without making any finding as to the merits of Reeder’s claim, having regard to the fact situation and the relevant terms of the collective agreement, the decision of Bettes not to file a formal grievance

ance was a reasonable one. Again, in our view, it cannot be said that Bettles or Spalding failed to put their minds to Reeder's complaint or that they dealt with it in a perfunctory or summary manner, and we do not find their conduct to have been arbitrary within the meaning of the section.

18. There was no evidence of any ill will or hostility exhibited by Spalding or Bettles towards Reeder, and nothing which could justify an inference of bad faith or discrimination in the representation of him.

19. The Board therefore finds there to have been no violation of the Act and the complaint is dismissed.

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**1014-79-R** Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union, Applicant, v. **Domco Foodservices Limited**, Respondent, v. Retail Clerks Union, Local 409, Intervener.

**Build-Up – Certification – Charges – Parties – Practice and Procedure – Intervener alleging collusion and fraud upon Board by Applicant and Respondent – Whether intervener has status to intervene – Applicant and Respondent agreeing present employees representative sample – Board not accepting parties' agreement – Board directing further hearing**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Harold F. Caley and John Sobolewski for the applicant; John P. Sander-son, Q.C. for the respondent; Mary Cornish and Les Dowling for the intervener.*

**DECISION OF THE BOARD;** October 3, 1979

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2. This is an application for certification.

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4. The Retail Clerks Union, Local 409 sought standing to intervene in the application. It submits that, pursuant to section 12 of the Act, the Board should not certify the applicant because the employer lent support to its organizing campaign. It also sought to argue that the instant application should be adjourned because of an impending build-up of the work force.

5. It is well established that in order to have the standing of an intervener in an application for certification a trade union must represent some of the employees concerned. It can satisfy that requirement by evidence that it holds their bargaining rights at least in part,



either through a certificate or a collective agreement, or, at the very minimum, that it has members among the employees affected. In this case Local 409 satisfies none of those requirements. It has no bargaining rights for any of the respondent's employees in the proposed bargaining unit and no membership support whatever among them. Counsel for the union submits that nevertheless it should be given standing because of the nature of its allegations. She argues firstly that a collusive arrangement between the applicant union and the employer is a fraud on the Board which the Board ought to inquire into regardless of the source of the allegation. She further submits that Local 409 should be given a voice in these proceedings to protect the rights of future employees who will be hired during the build-up and who will be deprived of the freedom to choose their bargaining agent.

6. The Board has on a number of occasions in the past been required to deal with the problem of entertaining allegations at large. In *Neo Industries Limited* [1976] OLRB Rep. Mar. 88, at page 90 the Board succinctly stated the rationale for its policy in this regard:

"It is thus obvious that the nature of the allegation sought to be made by the party attempting to intervene is not a concern of the Board in determining the primary question of the status of the party seeking to intervene. This is clear not only from the *Northern Electric Company* case 63 CLLC ¶15,484, but also from the decision of the Board in *Formrite Forming Ltd.*, [1971] OLRB Rep. Feb. 49. In the latter case, the intervener sought to establish that a fraud on the Board had been committed with respect to the membership evidence filed by the applicant. The Board found that the intervener was, at all times, a stranger to the proceedings. It went on to consider the question as to whether a stranger to a proceeding may be heard to allege that a fraud had been committed against the Board by the parties to the proceeding. The Board found that since the intervener was a stranger to the proceedings, it was not entitled to participate or adduce evidence in support of charges of fraud against the applicant or of improper or irregular conduct against the applicant or the respondent. It is abundantly clear that the party seeking to intervene in proceedings before the Board must be able to demonstrate that it represents at least one person in the bargaining unit with which the Board is concerned before it will be permitted to enter the proceedings, notwithstanding the particular nature of the interest or allegations it seeks to place before the Board. The reason for the strict adherence to the requirement of representational evidence in the bargaining unit before granting status is obvious. To throw open the proceedings, particularly certification proceedings, to every party which, although lacking representational status, felt it had an interest in the organization of employees in a particular bargaining unit would simply lead to endless delays, multiplicity of parties and issues and interminable proceedings."

7. The Board is satisfied that the above principles apply in this case. The Board therefore denied the Retail Clerks Union, Local 409 standing to intervene in this application.

8. The Board finds that all employees of the respondent at the St. Joseph Manor

Complex in Thunder Bay, Ontario, save and except Assistant Managers, persons above the rank of assistant manager and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

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10. Counsel for the respondent put before the Board the question of an impending build-up of the work force in the bargaining unit. He stated that the respondent anticipates hiring additional employees to an expected complement of 35 in the next two or three months. On the date of application there were nine persons employed in the bargaining unit. The additional hiring is related to the gradual opening of St. Joseph's Manor Complex, a new rest home. As the number of residents increases at the Manor, the number of food service employees supplied by the respondent will also increase. On the facts as represented by the respondent the Board's principles respecting the granting of bargaining rights in the face of a build-up of the work force would clearly apply. [See *Emil Frant* 57 CLLC ¶16,057; *Regina ex. rel. United Steelworkers of America v. Labour Relations Board (Sask.) and Noranda Mines Ltd.*, (1970), 7 D.L.R. (3d.) 1 (S.C.C.)]

11. Counsel for the respondent stated that the employer was not objecting to this application on the basis of its planned build-up. Through its counsel the respondent agreed that the nine employees in the bargaining unit on the date of application were sufficiently representative of the eventual complement of employees to allow the Board to certify the applicant.

12. At the hearing the Board took no issue with the agreement of the parties that the number of employees was sufficiently representative. Upon further consideration however, we have some concern. In an application for certification where one of the parties has put the Board on notice that a substantial build-up of the work force is likely the Board must, quite apart from any agreement of the parties, satisfy itself that the certificate it issues is based on the wishes of a number of employees who are sufficiently representative of the employees who will eventually comprise the bargaining unit. In this case if the respondent's representations are borne out by direct evidence, the Board would have some difficulty accepting that nine employees are a substantial and representative sampling of a work force that is expected to increase to 35 within a matter of weeks.

13. There being no direct evidence before the Board which the applicant could challenge, it would be unfair for the Board to treat the case as though build-up was established. In this case the Board should have some evidence from the respondent on any planned build-up in order to assess the merits of the application. The Registrar is therefore instructed to list this matter for a continuation of hearing. The purpose of the hearing will be to allow the respondent to adduce evidence of any plans to increase the number of employees in the bargaining unit. The applicant shall be given the opportunity to respond to such evidence.

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**0332-79-U Dominion Maintenance Limited, Harkness Waters Ltd., K. L. McCormick Paintings Co. (Division of Redmond Smither Ltd.), and Gallant Enterprises, Complainants, v. The Ontario Painting Contractors Association, The Accoustical Association Ontario, The Interior Systems Contractors Association, Kelvin Edgar, Herbert Butcher, Robert Yates, Clifford Haney, The Ontario Council of the International Brotherhood of Painters and Allied Trades, The International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 1590, Respondents.**

**Accreditation – Construction Industry – Duty of Fair Representation – Section 79 – Employers alleging Employer Bargaining Agency contravening duty of fair representation by misleading complainants – Employers seeking special status for Sarnia contractors – Bargaining objective dropped during negotiations – No violation of duty of fair representation established**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members C. A. Ballentine and W. Gibson

*APPEARANCES: Robert P. Armstrong, Q.C., Thomas H. Wilson and David Butt for the complainants; Robin B. Cumine, Q.C. and Kelvin Edgar for the respondents The Ontario Painting Contractors Association, Kelvin Edgar, Herbert Butcher, Robert Yates and Clifford Haney; A. M. Minsky, S. B. Wahl and A. Colafranceschi for the respondents The Ontario Council of the International Brotherhood of Painters and Allied Trades, The International Brotherhood of Painters and Allied Trades, Local 1590 and The International Brotherhood of Painters and Allied Trades; Joseph Liberman for The Accoustical Association Ontario.*

**DECISION OF THE BOARD;** October 15, 1979

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3. This is a complaint filed under section 79 of *The Labour Relations Act* in which the complainants allege that the Ontario Painting Contractors Association, The Accoustical Association of Ontario and the Interior Systems Contractors Association through the bargaining sub-committee of the Ontario Painting Contractors Association, comprised of Kelvin Edgar, Herbert Butcher, Robert Yates and Clifford Haney conducted themselves in negotiations with the respondent trade unions on April 11 and 12, 1978 in a manner that was arbitrary, discriminatory or in bad faith towards the complainant Sarnia contractors and hence in violation of section 136(2) of the Act. The complainants allege that its representatives at the negotiation sessions were assured during and at the conclusion of the negotiations that there would be no increase for the Sarnia area effective from May 1, 1979; the commencement of the second year of the provincial agreement but the first year it extended to cover the Sarnia contractors. The complainants allege that although told by Kelvin Edgar at the conclusion of negotiations that their instructions had been followed, a memorandum of settlement was signed by the committee without exempting the Sarnia contractors from paying wage increases effective from May 1, 1979. The complainants allege further that the respondent trade unions knew, or ought to have known, that the respondent contractor associations and named individuals were acting in violation of section 136(2) of the Act



when they negotiated the memorandum of settlement on April 11 and 12, 1978 and either participated in that violation or knowingly condoned it and therefore violated section 14 of the Act. In addition the complainants allege that by reason of either participating in or knowingly condoning the alleged violation of section 136(2) of the Act the respondent trade unions interfered with the administration of an employers' organization and/or contributed support to an employers' organization contrary to section 57 of the Act. The complainants allege further that the collective agreement which provides for second year increases to Sarnia was not approved or ratified in accordance with the provisions of By-law No. 1, clause 62 of the Ontario Painting Contractors Association.

4. The complainants seek damages or indemnification for all monies which may be awarded to the Ontario Council of the International Brotherhood of Painters and Allied Trades as a result of a grievance and resulting arbitration being OLRB File No. 0275-79-M in respect of the refusal of the complainant contractors to honour the terms of the provincial agreement. Alternatively, the complainants seek a declaration that the Collective Agreement between the Ontario Painting Contractors Association, Accoustical Association Ontario and The Interior Systems Contractors Association with the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades effective May 1, 1978 until April 30th, 1980 is wholly null and void or, alternatively, is null and void to the extent that it provides for any increases for the second year of its term in the Sarnia area for the period commencing May 1st, 1979; or alternatively that Appendix "A" to the aforesaid Collective Agreement is wholly null and void or is null and void to the extent that it provides for any increases for the second year of its term in the Sarnia area for the period commencing May 1st, 1979; or alternatively that the Local 1590 Sarnia Appendix to Appendix "A" is wholly null and void. The complainants also seek an order that the respondents pay to the complainants such fees and expenses, legal or otherwise, as they or any of them may have incurred by reason of the violation of Sections 136(2), 14 and 4 of *The Labour Relations Act*.

5. Section 136(2) of the Act provides:

"A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not."

6. This complaint has its roots in the 1977 legislation of mandatory province-wide bargaining on a trade by trade basis in the industrial, commercial and institutional sector of the construction industry. Under the legislation the Minister designated The Ontario Painting Contractors Association, The Interior Systems Contractors Associations of Ontario and the Accoustical Association of Ontario, as the employer bargaining agency to represent in bargaining all employers whose employees were represented by:

- (1) The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades; or
- (2) The following Local Unions: 114, 200, 205, 557, 864, 1003, 1080, 1494, 1590, 1671, 1783, 1824, 1832, 1891, 1904, 1919; or

- (3) any other Local of the International Brotherhood of Painters and Allied Trades which in the future may be chartered to represent journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers, or fireproofing applicators.

in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The employers' bargaining agency was empowered to represent in bargaining all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

It is important to note that the Painting Contractors Association was not given bargaining agency status in its own right but as part of a council comprised of itself and the two other contractor associations. The employer bargaining agency designation was dated March 29, 1978. The minister designated the International Brotherhood of Painters and the Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, as the employee bargaining agency to represent in bargaining all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers, or fireproofing applicators represented by:

- (1) The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades; or
- (2) the following Local Unions: 114, 200, 205, 557, 864, 1003, 1080, 1494, 1590, 1671, 1783, 1824, 1832, 1891, 1904, 1919; or
- (3) any other Local of the International Brotherhood of Painters and Allied Trades which in the future may be chartered to represent journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers, or fireproofing applicators;

in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The employee bargaining agent was empowered to represent in bargaining all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

The employee bargaining agency designation was dated April 12, 1978.

7. The effect of the legislation and the designations referred to above is to vest in the two bargaining agencies the right to conclude a collective agreement covering all of the contractors and employees referred to in the designations. Individual contractors and/or associations of contractors are not permitted to negotiate with and enter into collective agreements covering these employees. Similarly, no individual local union or council of trade unions is permitted to enter into a collective agreement covering these employees. The bargaining structure established by statute vests full authority in the designated bargaining agencies.

8. The Ontario Painting Contractors Association advised its constituent chapters by written notice of a meeting to take place at 2:00 p.m. on Monday April 10, 1978 for the purpose of discussing and preparing strategy for negotiations scheduled to commence on Tuesday, April 11, 1978. The Ontario Painting Contractors Association, as a component of the employer bargaining agency, was authorized to negotiate an appendix to the Master Agreement between the designated bargaining agencies, containing terms and conditions pertaining to painters. The evidence establishes that the preliminary meeting of April 10th took place and was followed by two days of negotiations with the trade union bargaining agency which resulted in a signed Memorandum of Settlement covering the terms and conditions which were to be included in Appendix "A" to the Master Agreement. The negotiation of the master portion of the agreement and the other appendices to it were not completed until September 8, 1978.

9. Mr. Kelvin Edgar, the President and General Manager of the Ontario Painting Contractors Association, presided over the April 10th meeting. The meeting was attended by representatives from each chapter of the Association. Mr. Edgar explained the mechanics of province-wide bargaining as related to the painting contractors and advised that the union ratification of any memorandum of settlement would be on a province-wide – 1 employee 1 vote – basis. He confirmed that the Sarnia contractors would not be covered by the provincial agreement until May 1, 1979 as their existing agreement did not expire until April 30, 1979. He then reviewed the union demands which has been received by mail. Each of the area representatives was canvassed as to the position being taken by its chapter in the negotiation of the contract. It is important to note that in the canvassing of positions no votes on resolutions were taken at this point. After the positions had been canvassed a sub-committee was struck to formulate a proposal to put before the union the next day and to carry on face to face negotiations with the union. Mr. Kelvin Edgar, along with Mr. Herbert Butcher, Vice-President, Mr. Clifton Hanes, Secretary/Treasurer, and Mr. Bob Yates, Director from Sudbury, were appointed to the sub-committee by those present. They met privately



during the evening of April 10th and presented a draft proposal to the provincial representatives on the morning of April 11th prior to commencing face to face negotiations with the union. The Sarnia chapter of the Ontario Painting Contractors Association was represented by Mr. Jack Dempsey, the General Manager of C. H. Heist Ltd., Sarnia, and a director of the Association and by Mr. Jim Redmond, the President of K. L. McCormick Ltd., a long standing member of the Association.

10. The Sarnia local of the International Brotherhood of Painters and Allied Trades submitted a list of local demands by letter to Mr. Edgar dated April 3, 1978 over the signature of Mr. Ron Last, the local business representative. The union was requesting a two hour show-up time for inclement weather, the continuance of the cost of living clause and improvements to a number of other premiums. These demands were communicated to Mr. Redmond by Mr. Edgar at the outset of the April 10th meeting. Mr. Dempsey was an hour late for the meeting and did not arrive until about 3:00 p.m. Mr. Redmond testified that he advised the meeting that Sarnia would not entertain a second year wage increase because it would already be paying rates in excess of those paid elsewhere in the province. The Sarnia contractors were required to pay wage increases of \$1.37 per hour under the last year of the local agreement. He advised further that Sarnia was adamant that there would be no show-up time guarantee as proposed by the Sarnia local and further that the cost of living clause must be struck along with the other local demands. He admitted in cross-examination that he indicated to the directors that Sarnia would be willing to pay additional monies in excess of its first year monies provided the total increase for the province was greater than what Sarnia was paying. Mr. Dempsey, after his arrival, stressed the Sarnia opposition to show-up time payment and emphasized the hold position generally. The evidence establishes that six of the eleven chapters present at the April 10th meeting took the position that there should be no wage increase of any kind. Mr. Redmond replied in the negative when asked in cross-examination if he had put forward the Sarnia position for no increase on any different terms than the other five chapters who had adopted a similar position.

11. The sub-committee met with the Directors at large on the morning of April 11, 1978 and tabled a draft proposal calling for a uniform across the Board increase in both years of the province-wide agreement. After some discussion it was agreed by majority vote to table an offer of 40¢ first year and 40¢ second year. There is no evidence that either Mr. Dempsey or Mr. Redmond voted against tabling the uniform proposal or that they spoke out against it. Mr. Dempsey testified that he asked Bob Yates, as he did every time the sub-committee returned, how does it affect Sarnia and was advised that it did not affect Sarnia. Mr. Yates does not recall being asked the question at any time during the negotiations. The sub-committee returned to the directors with each counter proposal from the union and the evidence establishes that no decisions were taken by the sub-committee without full consultation with the other directors of the Association. Mr. Ron Last, the Sarnia business agent, left the negotiations some time on April 11th. The evidence is that he did so after he was advised by Mr. Edgar that Sarnia would get no more or no less than the other areas of the province. Mr. Last called Mr. Redmond on the evening of April 11th and suggested they meet. He was rebuffed by Mr. Redmond. During the course of negotiations on April 12th the sub-committee returned from meeting with the union to advise that the parties were only pennies apart. After a discussion it was agreed by a vote of 13 to 2 to propose a uniform increase of 40¢ effective May 1, 1978 and a further 55¢ effective May 1, 1979. There is no evidence that the Sarnia representatives voted against the proposal or spoke out in opposition. Mr. Dempsey maintains that he asked Bob Yates how it affected Sarnia and was told not at all.

Mr. Yates does not recall the conversation. The proposal was put to the union and accepted as the basis of a settlement between the parties.

12. The Sarnia local was not successful in achieving a show-up time provision or the other local demands which it had tabled and the settlement did not incorporate the cost of living clause which had been included in the 4 year Sarnia agreement. Mr. Edgar read out the terms of settlement to the assembled directors. Mr. Redmond testified that he asked Mr. Edgar how the settlement affected Sarnia and was told "as per your instructions." Mr. Dempsey testified that he heard Mr. Edgar's reply. Mr. Edgar, however, testified that he told Mr. Redmond that the sub-committee had gotten rid of the Sarnia demands and denied that he used the words "as per your instructions." He did advise Mr. Redmond that Mr. Cairns of the International would be going to Sarnia to sell the deal. A memorandum of settlement constituting full settlement of all matters in dispute was drawn up and signed by the parties. Neither Mr. Dempsey nor Mr. Redmond remained for the drafting and signing of the memorandum. The memorandum, dated April 12, 1978, provided for uniform wage increases of 40¢ per hour effective May 1, 1978 and 55¢ per hour effective May 1, 1979. It is important to note that the rates across the province were not uniform prior to the April, 1978 negotiations and, excluding Sarnia, ranged from \$9.10 per hour to \$10.55 per hour after the May 1, 1978 increase. Although specific reference is made to Hamilton, Kitchener and Kingston in respect of an hours of work provision to be contained in their respective local appendices, and although specific reference is made to London and Windsor in respect of industry promotion, the memorandum does not contain any term or specifically referable to Sarnia.

13. Copies of the memorandum were forwarded to the association directors within a few days of signing. Mr. Redmond testified that although he observed that there was no reference to a Sarnia exemption from the second year increase, he thought it had been covered off in negotiations and when asked about it by Dave Butt, the General Manager of the Sarnia Construction Association, he replied that he had Kelvin Edgar's word. Mr. Dempsey testified that he did not see the signed memorandum until November/December, 1978. He acknowledged, however, that Mr. Last, the local business agent, advised him on or about April 17th that the union had ratified a settlement calling for a 55¢ per hour increase in the second year. He too was of the belief that Sarnia was exempt from the second year wage increase and testified that he told Mr. Last that there was "no way". A summary of the settlement under the letterhead of the Ontario Painting Contractors Association and over the signature of Mr. Edgar was forwarded to all members of the association on April 24, 1978. There is no mention of any special status for Sarnia in the summary. A summary of the provincial appendices to the Master Agreement was circulated from the office of the Ontario Painting Contractors Association in November, 1978. There is no summary for Sarnia which is shown as blank. Mr. Edgar testified that the Sarnia figures were not computed because the impact of the local COLA clause was not known at the time. He admitted, however that he could have obtained this information from the Sarnia contractors. He also testified that he did not list the Sarnia figures because Mr. Redmond had complained in the past about the publication of labour charge cards.

14. Mr. Dave Butt received a call from representatives of Ontario Hydro shortly after the release of a Sarnia Construction Association labour relations bulletin dated November 14, 1978. The bulletin stated that under the provincial painters agreement there would be no increase for Sarnia in the second year. Mr. Butt was advised by Hydro that the agreement it-

self, which had been concluded in all its parts on September 8th, did not exempt Sarnia from the second year wage increase of 55¢ an hour. Mr. Butt contacted Mr. Redmond who was in San Francisco on Ontario Painting Contractors Association business. He in turn contacted Mr. Edgar who was also in San Francisco and asked about the agreement. Mr. Edgar, who was awakened by the call, replied that his notes were in Toronto and he would get back to him. Mr. Redmond called Mr. Edgar again on Monday, November 27th and testified that Mr. Edgar told him his notes showed Sarnia in hold and that he would discuss it with the union. Mr. Edgar's version of the events is markedly different. He testified that the COLA clause had not been discussed in bargaining and he wanted to check with the union as to whether or not it would be in force in the last year of the 4 year Sarnia agreement. He testified that he was informed that it would be and he then communicated this information to Mr. Redmond. Mr. Redmond testified that he again called Mr. Edgar on December 1, 1978 and was told that Sarnia would have to live with the collective agreement. Mr. Redmond admitted in cross-examination that up to this time he had not communicated to anyone in the Ontario Painting Contractors Association that, in his mind, the agreement did not set out what it was supposed to.

15. In the meantime Mr. Dempsey called Mr. Yates in late November and asked him if he remembered the agreement whereby there would be no second year increase for Sarnia. Mr. Dempsey testified that Mr. Yates said "yes" and that he then asked Mr. Yates to call Mr. Butt. Mr. Butt testified that Mr. Yates called and confirmed that it had been agreed that there would be no increase for Sarnia in the second year. Mr. Yates acknowledges that he received the call from Mr. Dempsey and that he in turn made the call to Mr. Butt but he maintains that he said to both that there was "no increase on the Sarnia contract." He answered in the negative when asked if he ever agreed with the Sarnia representatives that there would be no increase for Sarnia in the second year of the provincial agreement.

16. In December Mr. Butt called Mr. Edgar and complained about the Ontario Association's treatment of the Sarnia painting contractors and advised that proceedings might be launched for a breach of section 136(2) of *The Labour Relations Act*. By letter dated February 12, 1979 the Sarnia painting contractors advised that these proceedings would be initiated.

17. The Board heard evidence from all four members of the sub-committee and in addition from six directors of the Ontario Painting Contractors Association who were not on the sub-committee but who were present at the meetings of April 10 through 12, 1978. None of these persons were of the understanding during the negotiations or at the conclusion that Sarnia was to be exempt from the second year wage increase. Mr. Ronald Ault testified that he never heard anyone promise Sarnia there would be no increase in the second year. It was his understanding that if the majority voted for a proposal it would be accepted. Mr. R. Has-tuck, the director from Waterloo gave similar evidence as did Mr. Paul Pfister, Kingston, Mr. Charles Palmer, Hamilton and Mr. George Mumory, a director from Toronto. None heard any special assurances being given to the Sarnia representatives and none recall the Sarnia position being forcefully put to the other directors.

18. There are 186 contractors across the province who are covered by the provincial agreement. These contractors employ approximately 3,000 painters. There is no evidence that any of the painting contractors covered by the provincial agreement with the exception of the complainant contractors in this case, are failing to abide by the terms of the provincial



agreement. The evidence establishes that Bagwell Coatings, the largest painting contractor based in Sarnia, is abiding by the terms of the provincial agreement.

19. The primary issue in this case is the alleged section 136(2) violation. If the complainants are unsuccessful in establishing a violation of this section, the allegations against the union must also fail.

20. Counsel for the complainants asks the Board to find on the evidence that Mr. Redmond articulated the Sarnia position to those present at the April 10th strategy meeting. He asks the Board to find further that those present, and in particular the bargaining sub-committee, understood that Sarnia was paying a \$1.37 increase during the first year of the provincial agreement under the terms of its subsisting collective agreement and was in a hold position for the second year of the provincial agreement. He asks the Board to find thirdly, that the bargaining sub-committee either negotiated an agreement which exempted Sarnia from second year wage increases and then signed a memorandum which did not contain such an exemption or alternatively, led the Sarnia representatives to believe that they were negotiating such an agreement when in fact they were negotiating an agreement which contained a uniform wage increase. In support of these alternative theories, counsel for the complainants relies on the evidence of Mr. Dempsey that throughout the negotiations he asked Mr. Yates how the packages affected Sarnia and was told not at all. He relies on the evidence of Mr. Redmond, as corroborated by Mr. Dempsey, that at the conclusion of the negotiations Mr. Redmond was assured by Mr. Edgar that the negotiations had been conducted "as per your instructions" and that Mr. Cairns would be going to Sarnia to sell the deal. Counsel maintains that Mr. Last left the meeting and attempted to deal directly with Mr. Redmond and that Mr. Cairns was intending to go to Sarnia because in fact there was to be no wage increase for Sarnia in the second year of the provincial agreement. He argues that the summary of provincial appendices (Exhibit #8) showed no figures for Sarnia because there was not to be an increase for the second year. He maintains that both Mr. Redmond and Mr. Dempsey conducted themselves throughout the negotiations and in the period up to December, 1978 in the belief that there was to be no increase for Sarnia in the second year. He asks the Board to accept that Mr. Yates admitted to Mr. Dempsey and Mr. Butt that there was to be no increase for Sarnia in the second year and find in favour of the complainants on this evidence alone. In addition he asks the Board to draw inferences favourable to his position from the reaction of Mr. Edgar when contacted by Mr. Redmond in San Francisco and from Mr. Edgar's decision to approach the union in respect of the operation of the COLA clause in the last year of the Sarnia agreement. Counsel for the complainants asks the Board to find, having regard to the foregoing and to the decision of the bargaining agent to sign a memorandum of settlement and later a collective agreement which did not exempt Sarnia from second year wage increase, that there has been a breach of the duty of fair representation contained in section 136(2) of the Act.

21. Counsel for the Ontario Painting Contractors Association and its officials takes a different view of the evidence. He asks the Board to find that while the Sarnia position was put forward by Mr. Redmond on April 10th it was put forward on the same terms and given the same consideration as the positions advanced by the other chapters of the association. He maintains that the bargaining sub-committee was empowered to prepare an initial proposal, did so, and communicated its decision to table a uniform wage offer to the directors. He asks the Board to find that the sub-committee acted at all times on the basis of decisions collectively taken by the directors including the representatives from Sarnia. He asks the

Board to find that the Sarnia representatives failed to participate fully in the deliberations of the directors to the extent they appreciated what was going on. It is the contention of counsel for the respondent trade unions that the Sarnia representatives did not understand the role of the employer bargaining agency in the province-wide structure and did not, therefore, realize that Sarnia was no longer the master of its own house as it had been in the past. It is his position that under the legislation the employer bargaining agency was not required to settle on the basis proposed by Sarnia although it was required to exhibit an honesty of purpose in its collective decision making. He maintains that the Sarnia representatives, having remained silent in the group deliberations from the point at which the sub-committee proposed offering a package containing a uniform wage increase until some seven months after the conclusion of a settlement on the basis of a uniform wage increase, cannot now argue a breach of section 136(2). Counsel for the Ontario Painting Contractors Association submits that much of the evidence relied upon by the complainants supports inferences other than those argued by the complainants. He maintains that Mr. Last left the meetings and contacted Mr. Redmond not because he understood that Sarnia was to get no wage increase in the second year but because the Sarnia local demands were discarded in their entirety. Similarly, he maintains that Mr. Cairns was to go to Sarnia, not because there was to be no increase in the second year but because the Sarnia local demands had not been achieved. He asks the Board to accept that the Sarnia rates are not shown in the summary of provincial appendices (Exhibit #8) because of the uncertainty caused by the operation of the COLA clause in the last year of the Sarnia agreement. He asks the Board to accept Mr. Yates' version of his conversations with Messrs. Dempsey and Butt and to find, therefore, that he did not make an admission but communicated his understanding that there was no increase on the Sarnia contract during the term of its operation. Counsel maintains that the evidence does not support the conspiracy theory advanced by the complainants and does not support, therefore, the finding that the Sarnia contractors were treated in an arbitrary or discriminatory manner or in bad faith.

22. Although this is the first case to come before the Board in which it is alleged that section 136(2) of the Act has been violated, the Board has dealt with complaints under section 60 of the Act since its enactment in 1971. Section 60, which is framed in essentially identical language to section 136(2), prohibits a trade union from acting in a manner which is arbitrary discriminatory or in bad faith in the representation of employees in the bargaining unit. The Board described the extent of the duty imposed under Section 60 of the Act in the leading *Walter Prinesdomu* case, [1975] OLRB Rep. May 444 in the following terms:

“The prohibition against bad faith and discrimination describe conduct in a subjective sense – that an employee ought not to be the victim of the ill will or hostility of trade union officials or of a majority of the members of the trade union ... Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment ...

In using the word arbitrary both the United States Supreme Court and the Legislature of this province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render use of this word superfluous .... Some insight is gained from the *Vaca* case wherein Justice White juxta-

posed the word arbitrary with the word 'perfunctory' and observed that a trade union, 'in a non-arbitrary manner [must] make a decision as to the merits of particular grievances.' It could be said that this description of the duty requires the exclusive bargaining agent to put 'its mind' to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious."

23. The failure of the union to process an individual's grievance to arbitration has given rise to the majority of section 60 complaints. In dealing with these complaints the Board has made it clear that section 60 does not require a trade union to process all grievances to arbitration. The union is expected to apply itself to the merits of each grievance and to treat individuals fairly and without hostility. It is understood, however, that the union is expected to weed out unfounded grievances and is entitled to subordinate the interest of the individual to the legitimate interest of the majority. The extent of the duty as defined in the *Prinesdomu* case, *supra*, and as applied in the grievance cases has equal application and has been so applied in section 60 cases dealing with trade union conduct in the negotiation of the collective agreement. The duty, while it requires a trade union to consider the competing interests within the bargaining unit, does not prohibit it from making trade-offs in the interest of the majority. In the *James Mason* case [1979]OLRB Rep. Feb. 116, a case in which a group of students alleged a contravention of Section 60 on the basis of a negotiated settlement which established a 42¢ per hour differential between student labourers and labourers, the Board, in dismissing the complaint, stated:

"It is all very well for the complainants to say that the respondent should exercise brinkmanship with the Corporation. As the Board noted in the *Canadian Union of Public Employees, Local 1749* case, [1976] OLRB Rep. Sept. 508, and in the *Ford Motor Company of Canada, Limited* case, [1973] OLRB Rep. Oct. 519, that in an effort to obtain the maximum benefits for its membership a trade union may be forced to make critical choices and trade-offs that may affect its membership unequally and that a trade union may be required to go so far as to abandon the interests of certain individual members. Trade-offs between trade unions and employers form the essence of collective bargaining. Trade unions frequently have to balance the interests of various groups within the bargaining unit, such as, for example, the skilled employee and the unskilled employee or the older employee and the younger employee when benefits are to be gained in improvements to the pension plan or the hourly rate. The Board is satisfied that the respondent has exerted equal effort on behalf of all classifications in the bargaining unit. The membership of the respondent does not act in bad faith and does not discriminate against students merely because it accepts a differential in wages between labourers and students and declines to go to the brink or beyond the brink of a strike or lockout."

(See also *David Matthews* [1976] OLRB Rep. June 283.) The Board has also made it clear that section 60 is not designed to allow the Board to impose internal negotiation and ratification procedures upon the trade union because the Board believes them to be "more congruent with effective collective bargaining." (See *George Magold, Tom Houston and others* [1975] OLRB Rep. Oct. 758 and *Jack P. Fogal* [1976] OLRB Rep. Aug. 428.) If the proce-



dures themselves do not give rise to a breach of the duty the Board confines itself to a review of the quality of the union's decision-making vis-a-vis the duty imposed by the section.

24. Section 136(2) of the Act serves the same purpose as Section 60; that is "to protect individuals from the collective so sanctioned to act on their behalf." Section 60 protects individual employees from arbitrary, discriminatory or bad faith treatment at the hands of the bargaining agent. Section 136(2) protects individual contractors from arbitrary, discriminatory or bad faith treatment at the hands of their designated or accredited bargaining agency. The standard of representation is the same in each case and in the view of the Board its Section 60 jurisprudence is relevant and directly applicable to cases coming before it under section 136(2).

25. The respondent contractor associations in this case have been designated under the act to represent the complainant contractors in bargaining. As the designated bargaining agency all the rights, duties and obligations of the complainant contractors under the Act are vested in the employer bargaining agency for the purpose of conducting bargaining and concluding a collective agreement. We start with the proposition, therefore, that the complainant contractors are legislated members of the collective and as such are subject to the decisions made by the employer bargaining agency in the negotiation of the provincial agreement so long as those decisions do not evidence arbitrary, discriminatory or bad faith conduct within the meaning of section 136(2) of the Act. The complainant contractors do not have an absolute right under the statute to have their local bargaining objectives pursued and cannot succeed, therefore, simply on the basis that these objectives were abandoned.

26. There is no allegation in this case that the procedures adopted by the bargaining agency placed the complainants at a disadvantage. The representatives of the complainants were notified of the strategy meeting held on April 10th and were permitted to participate fully. The statutory framework was described and in particular its effect on the Sarnia contractors was discussed. The sub-committee, which was duly struck to conduct face to face bargaining, reported to and took direction from the directors, including the Sarnia representatives throughout the negotiations. The terms of the proposed memorandum was reviewed with the directors before the document was signed.

27. The complainants in this case allege that they were the victims of the misrepresentation and deception of the bargaining sub-committee. It is their contention that they were led to believe that their bargaining objectives were being realized when in fact they were not, or if they were being realized, they were discarded at the last moment. The evidence, however, when viewed in the context of a collective bargaining setting, does not permit the Board to draw the conclusions urged by the complainants. The evidence establishes that Mr. Redmond advanced the Sarnia position at the meeting held on April 10, 1978. He made it clear that Sarnia did not want to pay a wage increase in the second year of the provincial agreement (their first year under the provincial agreement) and was opposed to the granting of any of the Sarnia local demands. The Board is satisfied on the evidence, however, that the purpose of the April 10th meeting was to lay the groundwork for bargaining and that the Sarnia representatives should have known that positions put forward were "opening" positions for the purpose of facilitating the preparation of a first proposal. Five other areas also took the position of no wage increase at the April 10th meeting and Mr. Redmond admitted that he did not put the Sarnia position on terms any different than the other five. There was

no uniformity in wage rates from area to area and while Sarnia was required to pay a \$1.37 increase under the local agreement during the first year of the provincial agreement the Sarnia position must be characterized on the evidence as but one of six "no increase" positions which had to be considered along with the others.

28. If Messrs. Redmond and Dempsey were of the view that the employer bargaining agency was required to table their April 10th proposal with the union they should have been disabused of that belief when the directors met on the morning of April 11th. The sub-committee had come to the not altogether surprising decision that the negotiation of a provincial agreement would be expedited if it were to offer a wage increase on a uniform basis. The proposed first offer was put to the directors, including the representatives from Sarnia, and approved by vote. There was no attempt to deceive or mislead. With the casting of votes the function of the assembled directors had changed from one of setting out initial bargaining positions to one of approving offers to be tabled with the trade union. Messrs. Redmond and Dempsey, for whatever reason, remained silent. Mr. Dempsey testified that with each proposal he asked Mr. Yates, a fellow director on the sub-committee, how it affected Sarnia and was told that it did not. Mr. Dempsey, by his own evidence, did not specify whether he was inquiring about the first or second year and hence, even if we were to accept his evidence on the point, which we are not prepared to do in the face of Mr. Yates' denial and in the absence of corroboration from the director sitting between them, it would be of little or no assistance to the Board. Mr. Redmond said nothing during the negotiation process which took place on April 11th and 12th. In the absence of any evidence that they were given private assurances that their April 10th position would be advanced thereby justifying their silence, the conduct of the respondents in this matter must be viewed against the silence of Messrs. Redmond and Dempsey at the critical meeting on the morning of April 11th and during the subsequent negotiations.

29. A copy of the memorandum was sent to all directors within 1 week of the conclusion of negotiations and a summary of its contents, including the uniform wage increase, was circulated to all members of the Ontario Painting Contractors Association by notice dated April 24, 1978. The negotiation of the province-wide agreement in its entirety was not completed until September 8, 1978. Clearly, the circulation of both the Appendix "A" memorandum and an accurate summary of its contents at a time when the provincial agreement was still being negotiated is inconsistent with the alleged attempt to mislead the Sarnia representatives. Similarly, the openness in communication immediately following the conclusion of negotiations negates whatever adverse inference might be drawn from the failure to record the Sarnia rates on the summary sheet (Exhibit #8) and causes the Board to conclude that the Sarnia rates were not circulated in November for the reasons given in evidence by Mr. Edgar. The manner in which the agreement was negotiated and the openness in communication immediately following the conclusion of negotiations also negates whatever adverse inference might be drawn from the reaction of Mr. Edgar to the call from Mr. Redmond in San Francisco on November 24th.

30. Mr. Redmond testified that he was told by Mr. Edgar that the agreement had been negotiated "as per instructions." In the absence of any evidence to establish that Mr. Redmond instructed Mr. Edgar other than to put forward an initial bargaining position along with the positions put forward by the other areas we accept Mr. Edgar's evidence that he did not use the words "as per your instructions." Having negotiated an agreement which did not contain any of the Sarnia local union demands including show-up time, which Mr.

Dempsey characterized as a strike issue, and the COLA, which was in the Sarnia local agreement, Mr. Edgar may have conveyed the impression that Sarnia's interests had been protected. He did not however assure Mr. Redmond that there would be no increase for Sarnia in the second year. Furthermore, having regard to the failure of Mr. Last to achieve any of his local demands we do not attribute his withdrawal from the negotiations, nor his contact with Mr. Redmond, nor the decision to send Mr. Cairns to Sarnia as supportive of the conclusion suggested by the complainants. We are of the view that Mr. Last withdrew because of his inability to negotiate the Sarnia local demands and that Mr. Cairns was slated to go to Sarnia because of Mr. Last's withdrawal and the absence of Sarnia local demands from the settlement.

31. Mr. Yates denied that he admitted to Mr. Dempsey and subsequently to Mr. Butt that it was understood during bargaining that Sarnia would not pay a wage increase in the second year of the agreement. He testified that he told both Mr. Dempsey and Mr. Butt that there was not to be an increase on the contract (meaning the existing Sarnia contract) and further that he was never of the belief that Sarnia was exempt from the second year increase contained in the provincial agreement. The Board has found that the Sarnia position, although put forward by Mr. Redmond on April 10th in the preliminary discussion, was never reiterated or otherwise advanced during the actual bargaining when decisions were being taken by vote. None of the directors who testified held the view during or after negotiations that Sarnia was to be exempt from the second year wage increase. In the result we accept Mr. Yates' evidence on the point and find that while he may have expressed himself in such a way as to create a misunderstanding as to his belief, he did not make the admission he was thought to have made by Mr. Dempsey and Mr. Butt.

32. The evidence does not support the finding that the complainant contractors were sold out or victimized by the ill-will of the employer bargaining agency. The bargaining sub-committee conducted themselves in an open and responsive manner vis-a-vis the directors of the Association including the Sarnia representatives. There is no evidence to support the finding that the bargaining sub-committee failed to put its mind to the Sarnia position to the extent that the Sarnia position was advanced. The Sarnia representatives, perhaps because they did not appreciate the nature of the provincial bargaining structure, did not respond to the dynamics of the bargaining process as they should have if they expected their position to be given special consideration. In the result the Board finds that the complainants were not subject to arbitrary, discriminatory or bad faith representation by the respondent associations and named individuals and hereby dismisses the complaint against the respondent associations and named individuals.

33. In the face of a finding that section 136(2) has not been violated the complaint against the respondent trade unions must also fail. Accordingly the Board hereby dismisses the complaint against the respondent trade unions.

34. The evidence establishes that the painting contractors whose bargaining rights are vested in the employer bargaining agency, with the exception of the complainant contractors in this case, have been and continue to abide by the terms of the province-wide agreement. Accordingly, even if there was a requirement to ratify, we are satisfied that the member contractors have ratified the agreement by their acceptance of its terms. Accordingly, we hereby declare that the Master Agreement between The Ontario Painting Contractors Association, Acoustical Association of Ontario, The Interior Systems Contractors Associ-



ation and The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades which is effective from May 1, 1978 is in full force and effect.

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**1216-79-R United Steelworkers of America, Applicant, v. Dominion Steel Export Co. Ltd. (Domex), Respondent.**

**Appropriateness – Bargaining Unit – Certification – Employer using students during school vacation period but no part-timers – Whether part-timers excluded when excluding students from unit**

**BEFORE:** George W. Adams, Chairman, and Board Members C. Ballentine and W. Gibson.

**APPEARANCES:** *Gerry Reeds and Mary Shane for the applicant; Philip J. Wolfenden for the respondent.*

**DECISION OF THE BOARD;** October 25, 1979

1. This is an application for certification.

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4. The Board further finds that all employees of the respondent company in Bramalea, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons not regularly employed for more than twenty-four (24) hours per week and students employed during the school vacation, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. At the hearing the respondent indicated that it did have a practice of employing students during the school vacation period, but that it did not have a current practice of employing part-time employees. A question therefore arose whether or not the Board would only exclude students employed during the school vacation period. In *Plummer Memorial Public Hospital* [1979] OLRB Rep. May 433, the Board refused to exclude students employed during the school vacation period from a unit of part-time employees, notwithstanding the agreement of the parties to such an exclusion. The Board indicated that its practice of including students employed during the school vacation period in a bargaining unit of part-time employees is predicated upon the belief that students employed during the school vacation period could not form a viable bargaining unit standing alone. Even if they could, the result would be to create an unduly fragmented situation. A similar problem arose in *Kafko Manufacturing Limited* Board File No. 0835-79-R, Sept. 26, 1979, (as yet unreported). In that case, applicants had to be certified for a bargaining unit comprised of both part-time employees and students employed during the school vacation, although the respondent only employed summer students. The respondent took the position that the application should be dismissed in that there were no part-time employees at the date of application and no history of them being employed by the respondent. This meant that the bargaining unit

would be comprised of students alone in the respondent's submission and that such a restricted bargaining unit would be inappropriate. The Board reviewed its policy with respect to part-time employees and summer students, indicating that it was its practice to deal with these two groups in tandem whenever asked by an applicant or respondent to include or exclude either group from a unit. The effect of the respondent's submission in *Kafko* would have been to deny students access to collective bargaining and accordingly, the unit was granted as requested by the applicant. Against all of this background, the Board is satisfied that it should continue to approach these two kinds of employees in tandem to avoid potential fragmentation in the future. Accordingly, we have described the bargaining unit in this case as we have above despite the lack of history of part-time employees being employed by the respondent.

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7. A certificate will issue to the applicant with respect to the said bargaining unit.

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**1185-78-M Ontario Public Service Employees Union, Applicant, v. Durham College, Respondent.**

**Employee – Reference – Confidential and managerial exclusions under *The Colleges Collective Bargaining Act, 1975*, reviewed – Whether maintenance foreman excluded from support staff bargaining unit**

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members D.B. Archer and F.W. Murray

**DECISION OF THE BOARD;** October 18, 1979

I

1. This is a reference under section 82 of *The Colleges Collective Bargaining Act, 1975* (hereinafter referred to as "the Act.") The Board, in a decision dated December 21st, 1978, appointed a Labour Relations Officer to meet with the parties and enquire into the duties and responsibilities of a number of employees. The parties were able to resolve all of the outstanding issues between them except the status of two employees: P. Koeslag and B. Smart. This decision is, therefore, confined to that issue.

2. The provisions of the Act most relevant to our consideration are as follows:

"82. If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause 1 of section 1 and the schedules, the question may be re-

ferred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes . . .

- 1(l) 'person employed in a managerial or confidential capacity' means a person who,
- (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
  - (ii) spends a significant portion of his time in the supervision of employees,
  - (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
  - (iv) is employed in a position confidential to any person described in subclause i, ii or iii,
  - (v) is employed in a confidential capacity in matters relating to employee relations,
  - (vi) is not otherwise described in subclauses i to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

## SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foreman,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor;
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity."

3. Peggy Smart is employed as the "private secretary" to H.A. Kirkconnell, the Re-



gistrar and Director of Student Affairs and it is argued, *inter alia*, that she is excluded from the Act by virtue of section 1(l) (iv) thereof. The position of private secretary and the application of sections 1(l) (i) – 1(l) (iv) to persons so described was discussed by this Board in *St. Lawrence College of Applied Arts and Technology*, July 11, 1978, (Unreported, Board File No. 1657-77-M).

“The Board is of the view that a person who serves as a private secretary to a person who falls within parts (i), (ii) or (iii) of the definition would also come within part (iv) of the definition. The Board has reached this conclusion on the basis of both the nature of the relationship and the material to which the private secretary has access. A private secretary is one who takes dictation, performs typing and transcribing services, maintains records, records minutes of meetings, prepares reports and performs related secretarial services on an exclusive basis. The relationship between the person coming within subclause (i), (ii) or (iii) of the definition and the person who performs this range of secretarial services on an exclusive basis is one which is based upon an individual and undivided loyalty. The person filling the position has, as a part of her regular job function, a day to day exposure to the correspondence of her superior, both incoming and outgoing, and to all other information which must be transcribed or recorded. She is privy in a material and necessary way to much of the information to which her superior is privy and accordingly, it must be found that she is employed in a position confidential to her superior. In the result the Board reads part (iv) of the definition as extending to persons who serve as private secretaries to persons falling within parts (i), (ii) or (iii) of the definition.”

On this branch of the argument, Ms. Smart's status turns on the duties and responsibilities of Mr. Kirkconnell.

4. Mr. Kirkconnell is one of the four senior officials of the college and, as such, is a member of “the cabinet” – a body which counsel described as the senior policy making body in the institution. It is not entirely clear how “the cabinet” is related to “the employer” (which is defined by statute as the college's board of governors) but it would appear that the cabinet is involved in the functions contemplated in section 1(l) (i). The other 3 members of cabinet are the Dean of Academic Affairs, the financial administrator, and the President of the College. The secretary to each of these individuals has been excluded by agreement of the parties. When Ms. Smart is absent from work, Mr. Kirkconnell will either perform her functions himself or assign them to one of the other three senior secretaries.

5. The evidence suggests that “the cabinet” is engaged in “the formulation of organization objectives and policy” in relation, *inter alia*, to labour relations and collective bargaining matters. As a member of the cabinet Mr. Kirkconnell participates in such decision making and as his private secretary Ms. Smart has access to cabinet minutes and other information not generally available to employees. On occasion, this information can include memoranda and correspondence concerning the college's collective bargaining stance or proposed bargaining positions. Mr. Kirkconnell also supervises some twenty-five employees, a number of whom are also excluded from the unit. As his private secretary Ms. Smart is

aware of all his staff recommendations and decisions, including confidential performance assessments which may lead to promotion or, occasionally, discipline. Of course, in an institution the size of the respondent, many of the personnel functions are performed by the personnel department, so that the involvement of Mr. Kirkconnell is less direct than it would be in a smaller organization. Nevertheless, to the extent that he must exercise supervision and control over the employees who report to him, Ms. Smart is necessarily involved.

6. It is unnecessary for us to decide whether Mr. Kirkconnell's participation in budgetary decisions (concerning his own department and perhaps the college) is sufficient in itself to trigger the statutory exclusion. The evidence concerning the budget-making process was simply too sketchy for us to reach any firm conclusion on the matter. In any event, having regard to the totality of the evidence we are satisfied that by virtue of her relationship with Mr. Kirkconnell, Ms. Smart falls within the exclusion set out in section 1(1) (iv) of the Act.

## II

7. We turn now to the status of Mr. Koeslag, who is described as a "maintenance foreman." We should make clear at the outset, however, that in our view nothing turns on this title. We do not think the Legislature intended that by merely designating an individual as a "foreman" or a "supervisor" an employer could automatically exclude him from the scope of the Act. In our view the question remains whether the individual, *in fact*, is employed in a managerial or confidential capacity. Before referring to the evidence of Mr. Koeslag's duties it may be appropriate to elaborate upon the general purpose of the statutory exclusions.

8. The statute provides for collective bargaining for the employees of the province's community colleges, but, in common with other provincial collective bargaining legislation, excludes "managerial" personnel from the bargaining process. The Act identifies two broad groups of individuals who are to be excluded. First, there are those whose managerial responsibilities directly involve the direction, supervision or control of other employees. These individuals have the power to affect the employment status or rights of their fellow employees and their decisions concerning hiring, promotions, discipline, discharge, etc. are manifestations of this power. Their exclusion prevents divided loyalties or a conflict of interest. The second excluded group consists of persons whose authority does not directly impinge upon employees on a day to day basis, but who perform the "senior" management functions of defining organization policy or objectives, or have high level executive responsibilities. Such persons may not have a direct or material involvement in labour relations, but they are obviously "managerial" since they bear the responsibility for the economic (or, in this case, academic) destiny of the organization. It is this group of individuals which is contemplated by section 1(1) (i) of the Act. Both excluded groups may require secretarial or other support services provided on a confidential basis. Persons who supply such services may also find themselves in a potential conflict of interest vis-a-vis their fellow employees and their trade union – not because they exercise managerial responsibilities, but because they have access to confidential information which might prejudice the employer's position in the collective bargaining relationship. These individuals are also excluded from the bargaining process. The Act is a collective bargaining statute and collective bargaining requires a clear identification, and separation of the bargaining parties. The bargaining table must have "two sides." As the Board observed in *Chrysler*, [1976] OLRB Rep. Aug. 399:

“The identification of management is fundamental to the scheme of collective bargaining as set out in *The Labour Relations Act*. What is contemplated is an arm’s length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side . . .”

9. Mr. Koeslag has no direct, or indirect, involvement with employee relations, nor was it suggested that he has any role to play in the hiring, firing or general supervision of other employees. Mr. Koeslag’s responsibilities involve the repair and maintenance of the respondent’s machinery and equipment. Approximately 25% of his time is spent doing electrical, plumbing, carpentry and equipment and machine repairs – although he is not a licenced, or fully qualified, electrician, plumber, carpenter or machinist. When he lacks the time, or the ability, to carry out the necessary maintenance or repair work, or to cope with a mechanical breakdown, the work is contracted out. Some 75% of Mr. Koeslag’s time is spent “behind the desk” arranging for outside tradesmen, or contractors, to perform various maintenance or repair jobs at the college. Mr. Koeslag is often the first person to become aware of such problems as they arise and it is he who does the “leg work” to arrange for local contractors to visit the site and estimate the cost of repair. In the case of equipment for which there are permanent maintenance arrangements, it is Mr. Koeslag who communicates with the maintenance contractor. Over the years Mr. Koeslag has become familiar with the local contractors and their work and he determines, in the first instance, the nature and extent of work required. He has an important input into the selection of the tradesman or contractor to do the job, however, it is the Director of Plant (a professional engineer) who has the responsibility for making the final decision. As Mr. Koeslag pointed out, it is the Director who has responsibility for the budget and must allocate the monies as he sees fit. Of course, this decision will be based, in many cases, on Mr. Koeslag’s recommendations and judgment – particularly in respect of day to day maintenance or repair problems.

10. When outside contractors are to be retained, Mr. Koeslag will often (about 40% of the time) monitor their work, and it is Mr. Koeslag who verifies that their work has been completed as required. The contractor’s bills are submitted directly to the Director of Plant, who forwards them to Mr. Koeslag for verification. Once he has done so, the bill is sent back to the Director of Plant. Mr. Koeslag did not know the process for actually disbursing funds. It is the Director of Plant who controls the purse strings. Mr. Koeslag testified that any repair has to be approved by the Director, and that he had never committed the college to anything other than minor expenditures without the Director’s approval. Even in situations where he spends small amounts of money on his own initiative he afterwards has to go to the Director for approval.

11. Mr. Koeslag works with one other employee who has recently been employed.



Although it was not contended that Mr. Koeslag's supervises this employee (in the sense contemplated by the Act), it is clear that he does meet periodically with the other "foremen" – some of whom do have a "personnel" responsibility. It would seem however, that these meetings are of a "technical" nature, and primarily involve assessing the maintenance work to be done. They do not involve discussions of salaries, grievances or other personnel matters. Mr. Koeslag also has a close relationship with the Director of Plant, and frequently participates in discussions with him concerning major repairs, equipment purchases or renovations. He even prepares preliminary specifications, which are often accepted without alteration by the Director. There is no doubt, however, where the ultimate authority lies.

12. It is clear that Mr. Koeslag is a valuable employee who performs important functions for the employer, and is of immense assistance to the Director of Plant. No doubt, as an experienced maintenance man, who is thoroughly familiar with the college's equipment, his views are solicited by the Director and his recommendations are generally followed. Nevertheless, we are not satisfied that the function which he performs can be considered "managerial." In fact, his authority is carefully circumscribed. He is largely a conduit who provides information to the Director, who then makes the ultimate decision. The language in section 1(l) [and in particular section 1(l) (i)] is admittedly very broad, but we do not think the evidence discloses that Mr. Koeslag falls within any of the enumerated exclusions. Counsel contended that Mr. Koeslag is involved in the "formulation of Plant Policy and the administration of the maintenance programs of the college." This, of course, uses the language of section 1(l) (i) which refers to persons

"involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer."

Counsel for the union contended, and we agree, that the Legislature could not have intended those words to apply to someone who is essentially a maintenance handyman – a "jack of all trades" who tries to keep the air conditioning, furnaces, fire extinguishing equipment and other machinery around the college in good working order and, when he is unable to do so, arranges for outside tradesmen to do the work for a price. It is difficult to see what possible collective bargaining purpose could be served by such exclusion, and in our view it would require a strained interpretation of the legislative language to reach it. By the same reasoning, one could point to a "transportation program" and a "food service program" and raise questions concerning the exclusion of bus drivers, cooks or dietitians. In our view the use of the words "organization objectives and policy" in section 1(l) (i) suggest *senior* managerial or executive decision making, and it is crystal clear that Mr. Koeslag has no such responsibility. Indeed, the Director of Plant is not in "the cabinet" and it is not clear what independent discretion he exercises.

13. Of more difficulty is section 1(l) (iv) since this exclusion covers persons who may not have managerial authority themselves but are employed in a confidential relationship with persons who do have such authority. The Board in *Sheridan College*, [1976] OLRB Rep. Dec. 844 commented commencing at 855:

"36. We accept the submission of the respondent that subclause (iv) must be intended to relate to persons employed in a confidential capac-

ity in matters other than employee relations (i.e., labour relations) since the latter is specifically provided for in subclause (v). However, the fact that an employee has access to confidential material does not necessarily mean that he or she is employed in a confidential capacity. In this regard, we note what was said by the Ontario Public Service Labour Relations Tribunal construing the same words in section 1(l) (m) of *The Crown Employees Collective Bargaining Act, 1972*:

'The Tribunal considers, however, that responsibility and confidentiality in the abstract are not sufficiently valid reasons for excluding persons from collective bargaining under the Act. The fact is that many government employees assume important responsibilities, often have access to confidential information. If the Tribunal were to exclude persons from the Act on these grounds alone, a very large number of Crown employees would be deprived of collective bargaining rights. The wording of the Act does not indicate that this was the intention of the Legislature.'

[from an unreported decision, *The Crown in The Right of Ontario (Workmen's Compensation Board)*, dated June 20, 1975; see also the decision of the Supreme Court of Canada in *Canada Safeway Limited*, 53 CLLC ¶15,508.]

37. The "confidence" referred to in section 1(l) (v) of the Act relates not so much to the material dealt with by the person in question as to the nature of the relationship between that person and the employer. And the confidence must relate to a function that is incompatible with collective bargaining.

38. Without attempting any accurate reference to existing positions within the community colleges, and simply for purposes of clarification of the meaning of subclause (iv) of section 1(l) of the Act, it would appear to this Board that a person employed as an executive assistant to persons described in the three preceding subclauses and who acted as an intimate policy sounding board to his or her superior and had substantial input into and influence on decisions of the employer relating to problem policies, budgets or the disposition of grievances, would be manifestly within the group of persons described in that subclause. On the other hand, an office assistant whose duties were more mechanical might not be. Following what was said in *Canada Safeway, supra*, each case must be measured in the light of its own particular circumstances. Reference must be had to the breadth and depth of the confidence between the person in question and his or her superior to determine whether, and to what extent, they are a meaningful participant in the decision-making processes of the employer. This Board has elsewhere recognized the problems of degree of decision-making that present themselves in institutions where large numbers of persons may be integrated into a collectivized policy and decision-making process, and it realizes that great numbers of academic and support staff personnel

may become privy to various kinds of confidential information. The issues that may arise in this context in the community colleges may not be unlike those dealt with by the Board in the *York University* case, *supra*. In dealing with those problems in the application of this Act, the Board agrees with the direction taken in the passage from the *Workmen's Compensation Board* case cited above.

The statute is intended to exclude individuals whose inclusion in a collective bargaining unit would be incompatible with collective bargaining either because they exercise managerial functions and would, therefore, be in a conflict of interest situation, or because they have access to confidential information which, if disclosed, would prejudice the employer's collective bargaining position. It is not simply that such information is confidential. Many individuals have access to information which the college might keep confidential (student or employee health records, for example) but what is important in a collective bargaining statute is the collective bargaining purposes for which such information could be used, and the possible prejudice to the employer's position.

14. Does Mr. Koeslag occupy a position such as this? In the circumstances we are satisfied that he does not. Even if the contracting information to which he is privy is confidential (and the evidence does not really deal with this matter) we do not think this is the kind of information which is contemplated by section 1(l) (iv). It has little or nothing to do with the bargaining relationship and, as has already been mentioned, Mr. Koeslag himself has no involvement, and limited information, on the maintenance budget. He has virtually no independent authority to expend the funds of the college. In the case of large expenditures – the improvement of lighting in the machine shop, for example – it appears that Mr. Koeslag's functions is restricted to ascertaining the extent of the work required, submitting this to the Director for approval, and thereafter arranging for contractors' bids which, again, are subject to the Director's approval. None of these functions would be impaired if Mr. Koeslag were a member of the bargaining unit, nor would the employer's position be prejudiced in any way. In light of the evidence concerning his duties and responsibilities, we are not satisfied that he falls within any of the enumerated statutory exclusions, nor do we see any reason why, in our opinion, he should be excluded pursuant to section 1(l) (vi) of the Act.

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**0865-79-R The Greater Northern Ontario Trucking Association, Applicant,  
v. Ethier Sand & Gravel Limited, Respondent.**

**Appropriateness – Bargaining Unit – Construction Industry – Trade Union Status – Union establishing status – Whether coming within construction industry provisions – Whether delivery of materials to construction site engaging in business in construction industry – Employer using same employees in construction and non-construction activity – Whether employer engaging in business in construction industry**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

**APPEARANCES:** *Rejean R. Parise, Maurice Dumontelle and Otto Binder for the applicant; no one appearing for the respondent.*

**DECISION OF THE BOARD;** October 9, 1979

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2. This application for certification was listed for hearing with respect to all matters arising out of and incidental to the application for certification including (a) whether the applicant is a trade union within the meaning of section 1(1) (n) and section 106(f) of *The Labour Relations Act*, (b) whether this is an application for certification within the meaning of section 108 of *The Labour Relations Act*, (c) the appropriate bargaining unit(s) and (d) the application of section 6(4) of *The Labour Relations Act* to this proceeding.

3. The evidence established that the respondent supplies sand and gravel for construction projects. The sand and gravel is hauled from pits to the construction sites by trucks which are operated either by employees of the respondent who are employed as truck drivers or are owner/operators of trucks and dependent contractors of the respondent. None of the owner/operators are employers. The material which is hauled is used in connection with the construction of roads. The respondent is primarily an excavator and seller of aggregate for other contractors who construct roads. As a secondary feature, the respondent constructs roads with its own materials. The respondent owns some of the pits from which it obtains aggregates.

4. It is clear that counsel for the applicant has exercised a great deal of care in advising his clients about the formation of the applicant. On the evidence before it, the Board is satisfied that the applicant has not received support from an employer within the meaning of section 12 of *The Labour Relations Act*.

5. The Board is satisfied that on June 26, 1979, the applicant's constitution was adopted by the employees who were present at an inaugural meeting, that the employees became members of the applicant and that they elected the officers provided for under the constitution as adopted. Under article 4.01 of the constitution employees of an employer are eligible for membership in the applicant. "Employee" is defined in article one as "means persons employed under a contract of work or services for another person for compensation or reward on such terms and conditions that the employee is in a position of economic dependence upon and under an obligation to perform duties for that person". In that same ar-

title “member” is defined as “means a member of [the applicant]. A member must be an employee as defined in *The Labour Relations Act* of Ontario as amended.”

6. The Board has considered the evidence and representations before it. The applicant is a voluntary association of employees and has been formed for purposes that include the regulation of relations between employees and employers. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.

7. The applicant did not address any argument with respect to whether the applicant is a trade union within the meaning of section 106(f) of *The Labour Relations Act*. The applicant has neither entered into any collective agreements pertaining to the construction industry nor received any certificates from the Board. In these circumstances it may not be said that the applicant is a trade union “that according to established trade union practice pertains to the construction industry” within the meaning of section 106(f). See the *B. Moscone Tile Co. Ltd.* case, [1970] OLRB Rep. April 44; the *Ben Bruinsma and Sons Limited* case, [1964] OLRB Rep. Feb. 647; and the *Zachary De Vuono Limited* case, [1969] OLRB Rep. July 493. Indeed, the applicant to this date has not established any kind of activity which pertains to the construction industry or otherwise.

8. Before an application may be successfully made under the provisions of section 108 of *The Labour Relations Act*, it is necessary for an applicant to establish not only that it is a trade union within the meaning of section 106(f) but also that the employer is an employer within the meaning of section 106(c) and that the employees are employees within the meaning of section 106(b). With respect to section 106(b), the applicant might well have been able to establish that the employees affected by the application are employees within the meaning of that subsection if it had called any evidence on this point. Since no evidence was called on this point, the Board is not prepared to find that the employees who are affected by this application are employees within the meaning of section 106(b) of *The Labour Relations Act*.

9. The respondent performs essentially the work of a supplier of materials to employers who apparently operate businesses in the construction industry. As a secondary feature, the respondent constructs roads from its own materials. There is no doubt that the construction of roads is included in the definition of “construction industry” in section 1(1) (f) of *The Labour Relations Act*. The delivery of materials to employers who are engaged in performing work at the site of the construction of roads is not the operation of a business engaged in construction of “works” at the site thereof and does not fall within the definition of “construction industry” within the meaning of section 1(1) (f). See the *Cedarhurst Paving Co. Limited* case, [1964] OLRB Rep. Dec. 442. The respondent, on the facts before the Board, is engaged in operations which essentially fall outside the definition of “construction industry” in section 1(1) (f) and as a secondary feature is engaged in operations which fall within the definition of “construction industry” within the meaning of section 1(1) (f). Where an employer is engaged in construction and non-construction activities with the same work force, the Board has held that such mixed activities do not fall within the meaning of “construction industry” in section 1(1) (f) and that such an employer is not an employer as defined in section 106(c) of *The Labour Relations Act*. See the *John Harvie Limited* case, [1969] OLRB Rep. April 145; and the *Canadian Pittsburgh Industries Limited* case, Board File No. 15984-69-M.

10. It follows from the foregoing that since the applicant is not a trade union within the meaning of section 106(f) and the respondent is not an employer within the meaning of section 106(c), this is not an application for certification within the meaning of section 108 of *The Labour Relations Act*.

11. The proposed bargaining unit includes both dependent contractors and other employees. Section 6(4) of *The Labour Relations Act* provides:

“A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.”

The applicant's proposed bargaining unit is “all employees of the respondent . . . who are employed as truck drivers or are owner/operators of trucks and dependent contractors of the respondent . . .” This proposed bargaining unit was included in Form 52, Notice to Employees of Application for Certification, Construction Industry. The Board has received no objection to this proposed bargaining unit from the persons who are affected by this application. In addition, Maurice Dumontelle, the applicant's business manager, gave evidence that he had discussed the proposed bargaining unit with the persons who are affected by this application and that none of these persons had any objections to the inclusion of dependent contractors and other employees in the same bargaining unit. In these circumstances the Board is prepared to include dependent contractors in a bargaining unit with other employees.

12. The Board has previously determined that this application is not an application for certification within the meaning of section 108 of *The Labour Relations Act*. A consequence of such a determination is that the Board is not required to determine the appropriate bargaining unit with reference to a geographic area. However, even though this is not an application within the meaning of section 108, this application is treated by the Board as an application for certification under the general provisions (non-construction) of *The Labour Relations Act*. In such circumstances the appropriate bargaining unit is defined with reference to a municipality rather than to a geographic area.

13. Having regard to the foregoing and pursuant to sections 6(1) and 6(4) of *The Labour Relations Act*, and to the representations of the parties, the Board further finds that all employees of the respondent in the Regional Municipality of Sudbury who are employed as truck drivers or are owner/operators of trucks and dependent contractors of the respondent, constitute a unit of employees of the respondent appropriate for collective bargaining.

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15. A certificate will issue to the applicant.

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**1239-79-R** Oil, Chemical & Atomic Workers International Union,  
Applicant, v. **Ethyl Canada Inc.**, Respondent, v. Employee Association of  
Ethyl, Intervener.

**Certification – Practice and Procedure – Pre-Hearing Vote – Applicant seeking to displace  
intervener – Unit applied for broader than unit in agreement between employer and intervener –  
Board ordering two voting constituencies with different choices on ballot – Hearing scheduled after  
vote to determine appropriate unit**

**BEFORE:** N. B. Satterfield, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

**DECISION OF THE BOARD;** October 17, 1979

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2. This is an application for certification in which the applicant requested that a pre-hearing representation vote be held of “all employees of the company at Ethyl Corporation of Canada Limited located in Corunna save and except foremen; supervisors; those above the rank of supervisor; office, professional and (sales) staff”. The intervener and the respondent were parties to a collective agreement which expired June 14, 1979. No conciliation officer has been appointed and the parties do not dispute the timeliness of the application. The collective agreement describes the intervener’s bargaining rights as being for “. . . all permanent non-supervisory employees in Maintenance, Operations, Laboratory and Stores, hereinafter called ‘employees’, at the Sarnia Plant”. The reply filed by the respondent described the bargaining unit which it considered to be appropriate. Except for the exclusion of part-time employees and students and a more precise description of the other exclusions, it appears to be the same as the unit described by the applicant. Neither the applicant’s nor the respondent’s description corresponds with the bargaining unit defined in the expired collective agreement. At the customary pre-hearing vote meeting with one of the Board’s Labour Relations Officers, the applicant and the respondent requested that the Board describe the appropriate bargaining unit (and thus the voting constituency should a vote be directed) to agree with the reply. The intervener contended that the voting constituency should be described as in the collective agreement.

3. Whenever the Board is faced with an application for certification by which the applicant is seeking to displace an incumbent trade union, the Board generally has held that the appropriate unit is the one described in the collective agreement between the incumbent and the employer. Therefore, the voting constituency is described by the Board in terms of that unit also.

4. Having regard to all of the foregoing circumstances, to the membership evidence before it and to the Board’s authority under section 8 of the Act, the Board finds as follows.

5. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituencies hereinafter described were members of the applicant at the time the application was made.

6. The Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency (voting constituency #1):

All permanent non-supervisory employees of the respondent in Maintenance, Operations, Laboratory and Stores at the Sarnia Plant.

7. The Board further directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency (voting constituency #2):

All employees of the respondent at its Sarnia Plant save and except permanent non-supervisory employees in Maintenance, Operations, Laboratory and Stores; foremen and supervisors; persons above the rank of foreman and supervisor; clerical, office and sales staff; professional and technical staff (Laboratory Control Analysts and Engineering Technologists); security guards; employees regularly employed for not more than 24 hours per week; students employed during vacation period and students employed under co-operative education programs.

8. All employees of the respondent in voting constituency #1 on the 9th day of October, 1979, who have not voluntarily terminated their employment or who have not been discharged for cause between the 9th day of October, 1979, and the date the vote is taken will be eligible to vote.

9. Voters in voting constituency #1 will be asked to indicate whether or not they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

10. All employees of the respondent in voting constituency #2 on the 9th day of October, 1979, who have not voluntarily terminated their employment or who have not been discharged for cause between the 9th day of October, 1979, and the date the vote is taken will not be eligible to vote.

11. Voters in voting constituency #2 will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

12. The respondent requested a hearing following the vote in order to make its representations to the Board on the appropriate bargaining unit. The Registrar, therefore, is instructed to list this matter for hearing on the earliest convenient date following the vote for the purpose of receiving the submissions of the parties on the appropriate bargaining unit or units and to deal with any other issues which then may be outstanding.

13. The matter is referred to the Registrar.
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**0237-79-U Fashion Craft Kitchens Inc., Complainant, v. The United Brotherhood of Carpenters and Joiners of America, Local Union 3054, Respondent.**

**Duty to Bargain in Good Faith – Union giving oral undertaking prior to conciliation meeting – Employer demanding written undertaking before tabling proposals – Union refusing to execute document – Whether Union or Employer bargaining in bad faith – Relevant principles reviewed**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *Donald J. McKillop, Q.C., Heinz Slotke and Melvin F. Malick for the complainant; J. Melnitzer and Adam Salvona for the respondent.*

**DECISION OF THE BOARD;** October 4, 1979

1. This is a complaint under section 79 of *The Labour Relations Act*. The complainant (hereinafter referred to as Fashion Craft) asks the Board to declare that the respondent union has bargained in bad faith contrary to section 14 of the Act and to make an order that the union cease and desist. In its reply the union raises a cross-complaint that Fashion Craft has bargained in bad faith. The matter before the Board therefore requires an examination of the conduct of both parties at the bargaining table.

2. This application and much of the dispute between the parties stems from the potential liability of Fashion Craft resulting from two arbitration awards. The awards were originally rendered against a predecessor employer, Cassin-Remco Limited (hereinafter referred to as Cassin-Remco). The union and Cassin-Remco were parties to a collective agreement which terminated on December 31, 1978. Pursuant to that collective agreement the union filed two grievances alleging that Cassin-Remco had failed to pay union dues in the amount of \$1,552.00 and some \$8,865.59 in insurance premiums. Both grievances were successful and in two separate awards, dated September 25, 1978, a Board of Arbitration ordered that both of the amounts be paid forthwith by Cassin-Remco.

3. On September 28, 1978 the union filed its two arbitration awards with the Registrar of the Supreme Court of Ontario for the purposes of enforcement pursuant to section 37(10) of *The Labour Relations Act*. The union then proceeded to enforce execution of the awards against the former employer and on October 18, 1978 writs of *Fieri Facias* were issued to the Sheriff of the County of Middlesex against Cassin-Remco for collection of the judgment debts of \$1,552.00 and \$8,865.59 respectively. Those writs of execution were, in fact, of doubtful value to the union: Cassin-Remco went into receivership and subsequently out of business at or about the same time as the union was pursuing its rights.

4. Eventually the business of Cassin-Remco, including all of its rights and liabilities under the collective agreement, were transferred by sale to Fashion Craft and Wayne A. Assaf, its president. In January, 1979 the union filed an application under section 55 of *The Labour Relations Act* for a declaration that there had been a sale of the business to Assaf and Fashion Craft. The application was unopposed and by a decision dated February 14, 1979 (Board File No. 1727-78-R), the Board found that there had been a sale of the business within the meaning of section 55 of the Act and that the successor employer, Assaf and



Fashion Craft, was bound by the collective agreement in force between the union and Cassin-Remco. At all material times thereafter Fashion Craft continued to observe the terms of the collective agreement in respect of its employees.

5. In order to protect its judgment debt the union then took steps to have its writs of execution against Cassin-Remco made good against the successor employer. On April 3, 1979 it made an application under Rule 546 of the Rules of Practice and Procedure of the Supreme Court of Ontario (R.R.O. 1970, Regulation 545, as amended) to obtain writs of *Fieri Facias* against Assaf and Fashion Craft or, in the alternative, to amend the writs outstanding against Cassin-Remco so that they run against Assaf and Fashion Craft. That application has not yet been finally disposed of. In a decision of the Court released May 23, 1979, Steele, J. indicated that the application appeared to be properly brought under Rule 546. Because of the novel nature of the application, however, the Court adjourned the motion pending the filing and cross-examination upon affidavits in support of several procedural objections raised by Assaf and Fashion Craft. Thus the union is taking steps to put itself in a position to collect from Fashion Craft the arbitration awards which it obtained against Cassin-Remco.

6. The previous collective agreement expired on December 31, 1978 and the parties are now seeking to negotiate a new collective agreement. Whatever the union's strict legal rights may be, its initiatives in the Court have complicated the negotiations for a new collective agreement. The possibility of executions in excess of \$10,000.00 being levied against Mr. Assaf personally and against Fashion Craft has become a serious bone of contention with the employer in bargaining. The employer sees that legal liability as a sword held unfairly over its head. It has taken the position that as long as the threat of execution remains there is little likelihood of progress in the negotiation of a new collective agreement.

7. At a meeting between the parties on or about January 11, 1979 the union submitted its proposals for a new collective agreement. It appears that no real bargaining took place, initially because Fashion Craft had not yet obtained legal advice to clearly define its position respecting its duty as a successor employer. Later negotiations were held up by an outstanding application for the termination of the union's bargaining rights; that application was eventually found to be untimely and dismissed by an order of the Board dated April 25, 1979 (Board File No. 1789-78-R). Thus prior to the appointment of a conciliation officer the employer made no formal reply to the union's proposal of January 11, 1979.

8. The parties then proceeded to conciliation. A meeting of the parties with the conciliation officer was scheduled for May 3, 1979. At this point the greatest obstacle to normal bargaining and the conclusion of a collective agreement between the parties was the outstanding awards which were then being proceeded upon by the union in the Supreme Court of Ontario. While the union was, or course, entitled to pursue its rights their abandonment was a bargainable issue of considerable concern to Fashion Craft.

9. Shortly before the conciliation meeting, on April 30, 1979, a telephone conversation that is critical to this complaint took place. Mr. Salvona, the union's business agent, called the company and spoke with Mr. Slottke, the general manager of Fashion Craft, who had been involved in collective bargaining with Mr. Salvona under the predecessor employer for some years. At the time of Mr. Salvona's call the union's motion for execution in the Supreme Court had twice been adjourned on consent. It was then scheduled for hearing on May 10, 1979. The possibility that the union would ultimately proceed with that motion

was an obvious source of tension which diminished the chances of the parties reaching a collective agreement. The Board is satisfied that Mr. Salvona was sensitive to the problem and that the purpose of his call was to attempt to smooth the way for fruitful bargaining at the upcoming conciliation meeting.

10. During the course of his conversation with Mr. Slottke, Mr. Salvona stated that the union realized that Fashion Craft and Assaf should not have been held responsible for the judgment debt to begin with. He explained that the union was now contemplating an action in the Supreme Court to make good its debt against the receivers of Cassin-Remco, the Toronto-Dominion Bank and Price Waterhouse Limited and that in light of that the union was dropping its action against Assaf and Fashion Craft. Having regard to all of the evidence respecting that conversation the Board is satisfied that Mr. Salvona's statement was clear and unconditional.

11. Immediately following the telephone conversation Mr. Slottke contacted Mr. Assaf and conveyed the news to him. Mr. Assaf reacted with understandable relief. He told Mr. Slottke that in light of this new development they should "sit down and see that we can do to put this contract to bed". Mr. Assaf then prepared a complete proposal for the terms of a collective agreement to be presented to the union at the conciliation meeting of May 3, 1979.

12. The meeting proceeded as scheduled. Mr. Slottke and counsel for the applicant attended on behalf of the employer while Mr. Salvona and Mr. James Reddy, the union steward, attended on behalf of the union, along with the conciliation officer, Mr. Draper. At the outset of the meeting counsel for Fashion Craft asked Mr. Salvona to confirm that the union was willing to stop proceeding against Fashion Craft on the execution of the outstanding debt, as he had indicated in his earlier telephone call. Mr. Salvona assured him that it was. The applicant's lawyer then insisted that Mr. Salvona immediately execute a signed release to that effect. Mr. Salvona answered that he could only do that after consultation with his lawyer.

13. An adjournment then followed to allow Mr. Salvona to contact his legal counsel. When the conciliation officer called the parties back together again Mr. Salvona told the employer's representatives that the union would not sign an unconditional release of liability. Shortly thereafter counsel for the union attended the meeting and confirmed the position taken by Mr. Salvona. He stated that a release of liability would be executed upon the conclusion of a satisfactory collective agreement and that the union was willing to adjourn its motion in the Supreme Court of Ontario from time to time as long as negotiations were proceeding. At that point the negotiations fell apart.

14. Fashion Craft took the position that the union was reneging on its previous undertaking. Through its counsel Fashion Craft stated that it would not make any offer to the union until it received a signed and unconditional release from liability in respect of the outstanding judgment debt. The following day, in an apparent demonstration of the employer's willingness to conclude a collective agreement, counsel for Fashion Craft forwarded a copy of the company's previously prepared proposal to the conciliation officer with the express instruction that it not be released to the union until the officer received instructions to that effect from the employer. At the hearing counsel explained that the employer intended to instruct the officer to put the offer to the union only when the union executed the necessary releases in favour of Fashion Craft and Assaf.

15. The employer submits that by making an abrupt about-face on an undertaking critical to the negotiations between the parties the union has bargained in bad faith. Counsel for the employer submits that Mr. Salvona's promise to abandon the court action against Assaf and Fashion Craft raised certain bargaining expectations in the employer. He argues that the subsequent change of position of the union, now requiring the execution of a collective agreement as a precondition for the release, is a reneging which destroys the framework for bargaining between the parties. Fashion Craft asks the Board to declare that the union's conduct is contrary to section 14 and to order the union to cease and desist from reneging on its oral undertaking to abandon its action against the employer. Implicit in the relief asked for by the employer is an order of this Board that the union cease and desist from pursuing its rights in the Supreme Court of Ontario.

16. Counsel for the union submitted that the Board does not have jurisdiction to make a finding or an order that could inhibit the pursuit by any party of its rights in an action pending before the Supreme Court. On that basis he made a preliminary motion that the application be dismissed. That motion was denied by the Board. Obviously this Board has no power to oust the jurisdiction of any court or tribunal in a matter that is lawfully before it. Nevertheless the Board is charged by the Legislature with a duty to administer *The Labour Relations Act*. That includes the obligation, on the filing of a complaint under section 79 of the Act, to examine the conduct of parties to the collective bargaining process and, to the extent that their actions may be in contravention of the Act, to make the necessary findings in that regard and to order such relief as may be appropriate in the circumstances. The Board is satisfied that the ultimate disposition of this case does not, for the reasons elaborated below, involve any encroachment on the powers and prerogatives of the Supreme Court of Ontario or the rights of either party before the Court.

17. Counsel for the union also submits that by the intransigent position which Fashion Craft has adopted in refusing to put its prepared offer, or any other offer, to the union, the employer has itself been guilty of a failure to bargain in good faith and make every reasonable attempt to conclude a collective agreement.

18. Section 14 of *The Labour Relations Act* requires the parties to meet, to bargain in good faith and to make every reasonable effort to make a collective agreement. The section does not contemplate that the parties must nor that they necessarily shall conclude a collective agreement. The Act is predicated on a realization that a trade union and an employer come to the bargaining table with divergent objectives, each party seeking to maximize its own self-interest. Collective bargaining under the scheme of the Act is grounded in voluntarism, and the trade-offs and compromises which parties are prepared to make are matters to be determined within their own judgment. As long as they negotiate within the law the collective agreement which they ultimately reach, or whether they conclude any collective agreement at all, must ultimately depend upon the ability and economic power which they can bring to bear in bargaining.

19. While the parties have great latitude to advance their own position and force its acceptance upon their opposite number, they may not lawfully base their conduct on a deliberate intention to see that no collective agreement will be concluded. They must, by virtue of section 14 of *The Labour Relations Act*, have as a common objective the making of a collective agreement: any contrary intention is in breach of the duty to bargain in good faith and make every reasonable attempt to conclude a collective agreement. (*DeVilbiss (Cana-*



*da) Ltd.* [1976] OLRB Rep. Mar. 49). However, a deliberate intention to frustrate bargaining is not always necessary to establish a breach of section 14 of the Act. There are two parts to the section. Firstly there is the duty to meet and bargain in good faith – a requirement that takes account of the parties' motives and intentions. Secondly there is the requirement to make every reasonable effort to make a collective agreement. That requirement may be offended against even where a party does not deliberately intend to make no agreement or seek to impede rational bargaining. It will be enough if their conduct, albeit unintentional, falls short of the requirement to make every reasonable effort. (Cf. *Noranda Metal Industries* [1975] 1 Can LRBR 145).

20. The Board's decisions interpreting section 14 have emphasized that the purpose of this section is to promote a rational and open discussion between the parties whereby their positions and the reasons for them become mutually understood. (*Graphic Centre (Ontario) Inc.* [1976] OLRB Rep. May 221; *Pine Ridge District Health Unit* [1977] OLRB Rep. Feb. 65). Only through the rational exchange of positions can the issues and the viewpoints behind them come to be appreciated by the parties. The very process of defining the issues and understanding the other side's position on each term in dispute allows the parties to best assess which of their own positions they can most easily compromise and on which of their adversaries' positions they can realistically hope to gain concessions. Through rational and open communication the parties can usefully evolve a constructive set of mutual expectations, both expressed and implied, in their bargaining with each other.

21. The expectations that parties come to have of each other are central to the quality of bargaining that goes on between them. A negotiator with a reputation for integrity will generally be more successful at exploring and finding acceptable compromises than one who is viewed as less trustworthy. While parties experienced in collective bargaining know that a certain amount of posturing and exaggeration is part and parcel of the negotiating process, they also know that bargaining is enhanced by a respect for the principle that once given, a man's word will be kept. The fact is, however, that bargaining is conducted by ordinary mortals, often in a heated atmosphere. The give and take of bargaining requires that negotiators have considerable freedom to move, without being confined by an unduly narrow code of conduct. As Professor Weiler aptly put it in the *Noranda Metal* decision: "Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules".

22. The purpose of section 14 of the Act is to provide a legal standard, and not a moral standard, for bargaining. Bargaining that is unsuccessful because it leads to a breakdown in trust is not by that fact alone bargaining in bad faith. The ideal of absolute mutual trust in bargaining is often not realized, and it would be unrealistic to hold that every act that gives rise to mistrust is necessarily a breach of section 14. It would obviously be futile for the Board to attempt to become the guarantor of honour and trust at the bargaining table. It is the Board's role to determine whether the basic legal requirements of the duty to bargain in good faith have been met. Depending on the facts, reneging may or may not be in breach of that requirement.

23. The line between reneging that offends and reneging that does not offend the duty to bargain in good faith is not easy to draw and must be determined with regard to the circumstances of each case. While some cases will inevitably fall within a grey area that will require the clarification of further Board jurisprudence, it is clear that reneging on an agreement or promise made in bargaining is a breach of section 14 of the Act whenever it is done

in furtherance of a party's unlawful intention to make no collective agreement, or has the predictable effect of destroying the framework for decision making at the bargaining table.

24. Previous decisions of the Board provide some indication of how the line is to be drawn. The Board has already noted that a party fails to bargain in good faith if by its lack of candor or deliberate misrepresentation it undermines the ability of the other party to engage in the decision making essential to collective bargaining. (*Inglis Limited* [1977] OLRB Rep. Mar. 128). In some circumstances the failure to keep promises or honour tentative agreements may have the same effect. On the other hand, in another complaint where a tentative agreement was reached on a major item at the bargaining table and there followed several months of impasse over a separate issue, the Board found that in light of changed circumstances the unilateral revoking of the earlier tentative agreement was not bargaining in bad faith (*Pine Ridge District Health Unit* [1977] OLRB Rep. Feb. 65). The Board has also found that a union did not breach section 14 of the Act when its officers had second thoughts and reversed themselves upon an undertaking made to the employer that the union's committee would recommend acceptance of a tentative settlement to the membership at a ratification meeting. In that case there was neither deliberate deceit nor detriment to the other party to establish a breach of section 14 of the Act. (*Indalloy, Division of Indal Limited* [1979] OLRB Rep. Jan. 35). In all of the decisions by which the Board has sought to give content to the section 14 duty there have been two predominant themes. Firstly the Board has sought to apply the section so as to avoid undue interference with the freedom of the parties to formulate, advance and reformulate their tactics and positions in bargaining. On the other hand the Board has not hesitated to bring the section to bear against any conduct that would defeat the scheme of the Act or destroy the bargaining process.

25. Obviously not every broken promise or reversal of position will deprive a party of the ability to bargain. Reneging that is hard bargaining or undiplomatic bargaining likely to cause an emotional flare-up, a temporary rupture in negotiations, and even some lasting resentment is not by that fact alone bargaining in bad faith or a refusal to make every reasonable effort to conclude a collective agreement within the meaning of section 14 of the Act. The Board's decisions do, however make it clear that at the very least a breach of section 14 occurs when the reversal of a position is part of a refusal to bargain in fact, a refusal to recognize the status of the other party, or a failure of communication so fundamental as to destroy the decision making ability (and thus the ability to bargain) of the opposite party.

26. In the instant case the union's representative, Mr. Salvona, made an unconditional, albeit unenforceable, oral promise to the applicant's manager during a telephone call. The conversation occurred prior to and outside the formality of the scheduled bargaining meeting. It was obviously intended to set the stage for bargaining between two men who respect each other and had considerable experience in bargaining together. It is therefore not surprising that the union's representative was taken aback at the outset of the conciliation meeting when counsel for the employer aggressively insisted that he "put it in writing". That legalistic demand understandably provoked a legalistic response.

27. Peace overtures such as Mr. Salvona had made on the telephone are not uncommon in collective bargaining. Generally when a party gives a first positive sign of movement on a delicate issue it is expected that the opposite party will accept that initiative with some sensitivity and discretion. In this case the employer's aggressive insistence that legal documents in the form of releases be executed on the spot – and prior to any bargaining – was be-

yond what the union could have expected as a response to its first holding out of the olive branch. The union's statement of a cease-fire in the courts had been freely given, with no concession whatsoever from Fashion Craft. Indeed up to the time of the statement Fashion Craft had not bargained at all, and when it insisted on the signed releases the employer had not yet made an offer of any kind. Having received nothing from the employer at that point the union could not be faulted for beginning to wonder whether it ever would.

28. Given the untrusting and legalistic approach of the employer, the union's reaction is understandable. Mr. Salvona had not previously addressed his mind to executing releases. Faced with the employer's demand he realized, with the advice of his lawyer, that in exchange for a signed release the union should first secure a signed collective agreement. Having obtained nothing from the employer in response to his first gesture, he was not prepared to convert an unenforceable gratuitous statement into a binding document. On these facts, the Board is inclined to agree with the union's submission that Mr. Salvona did not in fact renege or go back on his word. His oral undertaking was never withdrawn. But even if the Board accepts the employer's characterization of the union's refusal to execute the releases as a breach of promise, the union's response falls well short of destroying the framework for bargaining. Mr. Salvona's reaction to the employer's demands was motivated by a reasonable assessment of the union's own best interest, and not by any intention to avoid a collective agreement or deprive the employer of the ability to bargain. It did not, moreover, have that effect.

29. Generally section 14 of the Act should not be seized upon as a means to enforce an otherwise unenforceable statement nor to gain for a party an advantage it would not have had in the course of lawful bargaining. Certainly the facts of this case would not justify such a result. The evidence establishes that the union's reaction caused a temporary flare-up but did not limit the employer's decision making ability in bargaining nor otherwise destroy the framework for negotiations. The employer could, and still can, indicate through an offer or otherwise what the union's oral promise is worth in terms of a collective agreement. It can also let the union know what kind of collective agreement it can expect in return for a final discharge from liability on the outstanding arbitration awards. Nothing that the union did has impeded the ability of either side to explore these avenues and make their own bargain.

30. The Board therefore does not find that there has been a breach of section 14 of the Act by the union. We are likewise satisfied that the employer's strong reaction to what it perceived as reneging by the union and the temporary breaking off of bargaining during the filing of this complaint is not bargaining in bad faith. Both the complaint and the counter-complaint are therefore dismissed.

31. Given the strong feelings exhibited by the parties it should be emphasized that the rupture that has occurred does not relieve them of their continuing duty under section 14 of the Act. The union must be prepared to negotiate and obviously Fashion Craft cannot use the union's conduct as an excuse to refuse to bargain by failing to put any offer whatsoever to the union in the future. The Board is confident that with the cooling-off period that has elapsed the parties will be able to return to the bargaining table and constructively explore the possibility of a settlement that will be to their mutual advantage.

**CONCURRING DECISION OF BOARD MEMBERS O. HODGES AND H. J. F. ADE:**



1. A meaningful collective bargaining relationship is above all a matter of trust between those who have the authority to act for the parties. That relationship existed between Mr. Salvona, the union business agent, and Mr. Slottke, the general manager of Fashion Craft. Paragraphs 9, 10 and 11 of this decision make that clear. Absent the "assistance" of lawyers at the conciliation meeting of May 3, 1979, negotiations could well have concluded successfully that day. That is, a collective agreement could have been ready for ratification by the union membership, with a release from the judgment debts in the hands of Fashion Craft and Assaf.

2. The word of the union business agent Mr. Salvona was accepted by the general manager Mr. Slottke and by Mr. Assaf, President of Fashion Craft. That is evident from paragraph 11. It is clear from paragraphs 9 and 10 that the union business agent had given up the judgment debt as a bargaining aid; he simply wanted to bargain normally with Fashion Craft. However, when counsel for Fashion Craft demanded a written legal release as a threshold condition to bargaining, it is apparent that he offended the integrity of the union spokesman.

3. The spirit of cooperation and understanding that was present here and is so imperative to good industrial relations, was seriously damaged. The hard nosed demand of counsel for a written release at the very beginning of the conciliation meeting was out of place and out of time. The request for a written release would have been proper and reasonably anticipated by the union before the collective agreement could have been put to the membership for ratification.

4. We are impressed with the attitude and good sense of the union business agent and the general manager of the company. They understand the problems of this enterprise from experience. We are of the opinion that if the parties meet in the spirit of collaboration and trust so essential to a good collective bargaining climate and avoid the legalistic adversarial approach so destructive of a good bargaining relationship, they will reach the collective agreement they both now appear to want.

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**1026-79-R Canadian Food and Associated Services Union, Applicant, v. Federated Building Maintenance Company Limited operating as Commercial Building Services, Respondent.**

**Certification – Natural Justice – Parties – Practice and Procedure – Employer alleging denial of natural justice to employees – Large majority unable to read English – Whether employer has standing to make allegation – Whether Board posting in English only denial of natural justice**

**BEFORE:** M. G. Picher, Vice-Chairman and Board Members E. C. Went and D. B. Archer.

**APPEARANCES:** *M. Swenarchuk and W. Iler for the applicant; F. R. Von Veh, Steve McCormack and Ted Kavanagh for the respondent.*

**DECISION OF THE BOARD;** October 30, 1979

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2. This is an application for certification.

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5. The employer has raised an objection to these proceedings. It submits that the employees were given insufficient notice of the union's application for certification and of the hearing before this Board.

6. There are some 125 employees in the bargaining unit, comprising the cleaning staff of First Canadian Place in Toronto. Following the Board's normal practice copies of the Board's Notice to Employees of Application for Certification and of Hearing (Form 5) were posted in various locations in their workplace. It is common ground that 80 per cent of the employees are of Portuguese origin and cannot read English. They could not, in other words, understand the meaning of Form 5 without assistance.

7. The employer submits that because the notices were not posted in Portuguese the employees have been denied natural justice. It requests that the application be delayed by the extension of the terminal date and a reposting of Form 5 in Portuguese. Alternatively it submits that the Board should order the taking of a representation vote with notices and ballots in both English and Portuguese.

8. In effect the employer seeks to protest on behalf of a group of employees when in fact the employees themselves have raised no objection. The evidence filed by the union and submitted to the Board's normal verification procedures establishes that at the minimum 96 of the 125 employees in the bargaining unit signed membership cards indicating their wish to be represented by the applicant union. The employer does not challenge the validity of those cards. All 125 employees were in attendance on the Board's premises during the hearing, having been subpoenaed by the employer, and not one among them came forward to support the employer's protestations about natural justice.

9. The first issue is whether the employer has standing to make procedural objections on behalf of employees who have not themselves sought to do so. Generally this Board's experience has led it to respect the ability of employees to represent their interest in applications before the Board. The Board does not, as a general rule, permit an employer to speak for the employees in certification proceedings. The Board will entertain the evidence and representations of an employer respecting allegations of fraud, intimidation or coercion in the gathering of membership evidence. In those cases the employer is entitled to object, firstly, because it has a direct interest not to be party to a collective bargaining relationship based on bargaining rights illegally obtained; and, secondly, because the very unlawfulness alleged would tend to deprive the employees of the ability to freely represent their wishes. Apart from those extreme circumstances amounting to a fraud upon its own procedures, the Board does not place the employer in the position of spokesman for its employees.

10. The Board's practice in that regard is consistent with a number of decisions of the Supreme Court of Canada. In *Quebec Labour Relations Board v. Cimon Ltee.* [1971] S.C.R. 981; 21 D.L.R. (3d) 506 on an application for certification, an employer sought to set aside an order of the Quebec Labour Relations Board directing a representation vote

among its employees on the grounds that a second union had not been given notice of the application. The Court upheld the ruling of the Board, finding that the company was unlawfully pleading on another's behalf an objection in which it had no legal interest. A case more closely resembling this one is *Cunningham Drug Stores Ltd. v. B.C. Labour Relations Board* [1973] S.C.R. 256; 31 D.L.R. (3d) 459. In that case the Court found that during an application for certification an employer was without standing to object to the sufficiency of notice to employees affected by a ruling of the British Columbia Labour Relations Board altering the composition of the bargaining unit.

11. A more recent decision of the Supreme Court of Canada demonstrates even more forcefully the Court's appreciation of the concerns that labour boards have whenever employers purport to invoke the rights of their employees in certification proceedings. In *Re Canada Labour Relations Board and Transair Ltd.* (1976), 67 D.L.R. (3d) 421 the employer argued before the Court that the Canada Labour Relations Board had erred in refusing to entertain a petition against certification by a group of employees. The petition, tendered late in the certification proceedings, was found by the Board to be untimely. The employees who sponsored the petition did not seek judicial review of the ruling against them and the employer did not seek to make them a party to its own application for judicial review under section 28 of the *Federal Court Act*. The Court concluded that the employer was without standing to invoke an alleged error of law in which it had no legal interest. Laskin, C.J.C., speaking for the majority, said at p. 438:

"If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-a-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court."

The foregoing reasoning is manifestly applicable in this case. Any objection that the employees have had insufficient notice of this application or are in a state of confusion about their rights, there being no fraud or impropriety alleged, is a matter for the employees themselves to raise. The employer is without standing to plead the objection which it makes. Its motion is therefore dismissed.

12. Before parting with this matter, it should perhaps be added, if only to clarify the Board's procedure, that it is doubtful whether our conclusion would be any different even if the objection had been raised by a group of employees. There are over eighty Board forms, including its Notice to Employees of Application for Certification and of Hearing, all of which have been promulgated as regulations by the Lieutenant Governor in Council. They are always posted in English; the only qualification to that rule is that, upon request, the Board will provide a French translation for simultaneous posting with the English version. For years the Board has posted its notices in Canada's two official languages only without any apparent hardship to employees.

13. Obviously there are numbers of employees in the Canadian workplace who, by reason of their national origin, are not able to read or write either English or French. They are nevertheless usually quite able to function within the mainstream of everyday life in



Canada. Whether they deal with commercial interests or with their government, they generally expect to do so in one of the two official languages of Canada. The same is true in their dealings with the courts or with public administrative tribunals. Immigrant Canadians generally obtain, and can reasonably be expected to obtain, the assistance necessary to enable them to respond to process issuing from a court or tribunal. In this case all 125 of the employees were able to respond to the Board's subpoena, written in English, issued to them by the employer. In the Board's experience employees who are not fluent or literate in English do not fall within a special class of disadvantaged workers. While the Board has always made use of translations in the receiving of evidence, it does not presume that immigrant Canadian employees are less able than others to inform themselves and assert their rights under *The Labour Relations Act*. (*Ilsco of Canada Ltd.* [1973] OLRB Rep. May 221; *International Chinese Restaurant* [1977] OLRB Rep. Oct. 688; *Dylex Ltd.* [1977] OLRB Rep. June 357.)

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15. The parties are disagreed over the employment status of four persons who are described by the respondent as "working foreladies". The applicant submits that they should be excluded from the bargaining unit because they exercise managerial functions and are therefore not "employees" within the meaning of section 1(3) (b) of the Act. Since the ultimate resolution of that issue cannot affect the entitlement of the applicant to a certificate, the Board hereby grants interim certification to the applicant. . . .

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## **2172-78-M Haldimand-Norfolk Regional Health Unit, Employer, v. The Staff Association Haldimand-Norfolk Regional Health Unit, Trade Union.**

**Reference – Collective agreement providing for appointment of interest arbitrator by Minister – Minister referring question of authority to appoint arbitrator to Board – Whether Board has jurisdiction to advise Minister**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members H. J. F. Ade and M. J. Fenwick.

**APPEARANCES:** *Michael Gordon, Tim Sargeant and D. W. McEntee for the employer; Stanley Simpson, J. S. Yari and G. Gosseline for the trade union.*

**DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER H. J. F. ADE; October 24, 1979**

1. Pursuant to section 96 of *The Labour Relations Act*, the Minister has referred to the Board the question of whether he has the authority to appoint a person to constitute a board of arbitration.

2. The Staff Association has made a request to the Minister pursuant to the provisions of the collective agreement between the parties to appoint an employer nominee or a

sole arbitrator for a board of arbitration to be established to set the terms of a new collective agreement between the parties. The Board of arbitration in question, therefore, is an interest arbitration board rather than a rights arbitration board.

3. Under section 96 of the Act, the Labour Relations Board is given jurisdiction to advise the Minister as to whether or not he has authority to make such appointments as are necessary to constitute a board of arbitration pursuant to section 37(4) of the Act. In a previous decision, *Haldimand-Norfolk Regional Health Unit*, [1978]OLRB Rep. Feb. 197, the Board found that section 37(4) appointments relate only to a rights arbitration board and not to an interest arbitration board. The union in this case has asked the Minister to make an appointment to constitute a board of interest arbitration pursuant to the contractual authority he has been given under the terms of the collective agreement and not under section 37(4) of *The Labour Relations Act*. Accordingly, the Board, following its decision in *Haldimand-Norfolk*, *supra*, finds that it is without jurisdiction under section 96 of the Act to advise the Minister in this matter.

#### **DECISION OF BOARD MEMBER M. J. FENWICK:**

1. I agree with the decision of the majority that technically this Board does not have jurisdiction under *The Labour Relations Act* to advise the Minister as to whether or not he should make the requested appointment.

2. Pursuant to the authority given the Minister by the parties under the terms of their collective agreement, however, I would strongly urge the Minister to make whatever appointments are necessary to constitute a board of interest arbitration. Through Article 13 of their collective agreement the parties have agreed to refer unsuccessful negotiations to a board of interest arbitration to establish the terms of the new collective agreement. In my view the employer should not be able to thwart the dispute resolution procedure agreed to by the parties by refusing to appoint an employer nominee or agree to a sole arbitrator. If the Minister consents to make the appointments the employer has refused to make the parties can then proceed down the road to the resolution of their collective bargaining differences.

3. In the interest of sound industrial relations between the parties I strenuously urge the Minister to make the requested appointment.

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**0154-79-U** The Staff Association Haldimand-Norfolk Regional Health Unit, Complainant, v. **Haldimand-Norfolk Regional Health Unit**, Respondent.

**Change in Working Conditions – Reference – Employer raising technical obstacles to establishment of board of interest arbitration – Collective agreement permitting Minister to make appointment to board – Whether right to arbitration frozen by section 70**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members H. J. F. Ade and M. J. Fenwick.

**APPEARANCES:** *Stanely Simpson, J. S. Yari and G. Gosseline for the complainant; Michael Gordon, Tim Sargeant and D. W. McEntee for the respondent.*

**DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER H. J. F. ADE;** October 24, 1979

1. The Staff Association has filed a complaint under section 79 of *The Labour Relations Act* alleging that it has been dealt with by the respondent Health Unit contrary to section 70(1) of the Act which reads as follows:

“Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.”

Where notice to bargain has been given and no collective agreement is in operation, neither the employer nor the union, subject to the time limits set out in section 70(1), may alter any



terms or conditions of employment or rights, duties or privileges without the consent of the other. Section 70 is designed to place a freeze on terms and conditions of employment during negotiations to promote a stable atmosphere in which the parties may bargain for a collective agreement. Through section 70 the Act recognizes that sudden, unilateral changes in working conditions made during the negotiations can have a demoralizing effect and undermine bargaining.

2. In this case the Staff Association contends that the employer has attempted to take away one of its rights under the terms of the collective agreement between the parties. The Staff Association alleges that Article 13 of the collective agreement gives it a right, at a certain point in negotiations, to refer the negotiations to a board of interest arbitration to have the board establish the terms of the new collective agreement. The Staff Association complains that the employer's conduct, viewed in its entirety, is tantamount to an attempt by the employer to take away the Staff Association's right to invoke the interest arbitration provisions in their collective agreement through the establishment of a board of arbitration. In particular, the union focuses on the employer's refusal to appoint a nominee to a board of interest arbitration pursuant to Article 13 of the collective agreement together with its challenge to the jurisdiction of the Minister of Labour to make the appointments necessary to constitute the board as well as its further challenge to this Board's jurisdiction to advise the Minister as to whether he has the authority to make the requested appointments.

3. The relevant portion of Article 13 of the collective agreement reads as follows:

"In the event that either of the parties elects under Article 18 to terminate, modify or amend this agreement and should the parties be unsuccessful in negotiating a new agreement on or before December 15, 1978 or December 15 of any anniversary year, either party may request the Minister of Labour to appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement. Should the Minister of Labour not appoint a conciliation officer or if a conciliation officer is appointed but no collective agreement is effected after fourteen (14) days from the date of the report of the conciliation officer to the Minister of Labour, then either party may notify the other in writing of its desire to submit to arbitration the negotiation of a new collective agreement and the notice shall contain the name of the first party's appointee as single arbitrator. The recipient of the notice shall within five (5) days advise the other party whether or not the first party's appointee is acceptable as a single arbitrator and if not then the recipient of the notice shall also advise the other party of the name of its appointee to an arbitration board and the party who first sent the notice shall then within five (5) days advise the other party of its appointee to the arbitration board.

The two (2) appointees so selected shall appoint within five (5) days of the appointment of the second nominee a third person who shall be Chairman. *If the recipient of the notice fails to approve the single arbitrator or fails to appoint an arbitrator or if the two (2) appointees fail to agree upon a Chairman, the appointment shall be made in either event by the Minister of Labour for Ontario upon the request of either party.* The

single arbitrator or arbitration board shall herein determine the new collective agreement and shall issue a decision and the decision shall be final and binding upon the parties. The decision of the majority shall be the decision of the arbitration board, but if there is no majority, the decision of the Chairman shall govern.

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When the single arbitrator has been appointed or the three members have been appointed to the board of arbitration, it shall be presumed conclusively that he has been appointed or it has been established in accordance with this agreement, and no order shall be made or process entered or proceedings taken in any court whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto or otherwise, to question the appointment of the single arbitrator or the establishment of the board or the appointment of any of its members, or to review, prohibit or restrain any of his or its proceedings.” [emphasis added]

4. On October 25, 1978 the Staff Association gave notice to bargain pursuant to Article 18 of the collective agreement. The parties met and bargained. The Health Unit’s proposals included the elimination of the interest arbitration clause in the collective agreement. On January 11, 1979 the Health Unit notified the Staff Association pursuant to section 44(2) of *The Labour Relations Act* of its desire to terminate the collective agreement upon 30 days notice or, in this case, February 10, 1979. Counsel for the Staff Association disputed the employer’s right to unilaterally terminate the collective agreement. Anticipating, however, that the employer would take the position that the union could not invoke interest arbitration after the termination of the agreement on February 10, 1979, the Staff Association forthwith applied to the Ministry for the appointment of a conciliation officer. By the terms of Article 13 a request to the Minister of Labour to appoint a conciliation officer is one of the preconditions to invoking interest arbitration. Apprehensive that the appointment would delay the process and put the Staff Association in a situation where it would be unable to invoke Article 13 until after the February 10th termination date, the Staff Association asked the Minister to deny its requested appointment.

5. On January 25, 1979 the Minister appointed a conciliation officer pursuant to which a meeting was held on February 5th. On February 6th the Staff Association, faced with what it considered the inevitable argument of the Health Unit that the Staff Association’s right to invoke interest arbitration would not survive the termination of the collective agreement on February 10th, gave an anticipatory notice to the employer of its desire to submit the negotiation of a new collective agreement to a Board of interest arbitration. When a conciliation officer has been appointed, Article 13 states that the notice to the other party of a desire to submit the negotiations to a Board of arbitration may be made 14 days after the report of the conciliation officer. The notice given on February 6th was, by its terms, to take effect fourteen days from the date of the report of the conciliation officer to the Minister of Labour. On February 8, 1979 a no-board report was issued by the Ministry.

6. Pursuant to the further terms of Article 13 the Staff Association’s notice to invoke interest arbitration contained the name of the Association’s appointee as a single arbitrator.

On February 13th the Health Unit sent the Staff Association a telex rejecting the Staff Association's single arbitrator appointee. Although the Health Unit asserted that a Board of arbitration constituted pursuant to Article 13 would be without jurisdiction to determine the differences between the parties, it named, without prejudice, an appointee to an arbitration board.

7. In a follow-up letter sent to the Staff Association the next day, however, the Health Unit nullified its proposed appointment and set out in detail its legal positions: Counsel for the Health Unit asserted that the Staff Association's notice to invoke Article 13 was ineffective because the notice to bargain given by the Staff Association on October 25, 1978 was not proper notice under Article 18 of the collective agreement. In addition the Health Unit alleged that the anticipatory notice to invoke Article 13 given on February 6th was not effective because it was not given within the time limits established by Article 13. The Health Unit took the further position that the notice to invoke Article 13 was ineffective because it had not yet received notice of the report of the conciliation officer to the Minister of Labour. More sweepingly, counsel argued that all of Article 13 was null and void. For all of these reasons the Health Unit refused to appoint a nominee. Counsel further argued that the Minister of Labour had no jurisdiction to make such an appointment under either *The Labour Relations Act* or the collective agreement.

8. In view of the employer's refusal to appoint a nominee to constitute a board of interest arbitration, the union, by a letter dated March 6, 1979, requested the Minister of Labour to appoint a nominee for the employer or appoint a single arbitrator pursuant to Article 13 of the collective agreement. In the same letter counsel for the Staff Association suggested that in view of the employer's position the Minister should refer the question of whether or not the Minister has jurisdiction to make the appointment to the Labour Relations Board. The matter was referred to the Board and a hearing was scheduled. Prior to the hearing the employer gave notice that it would take the position that the Labour Relations Board was without jurisdiction to advise the Minister on the question of whether or not he would have the authority to make the requested appointment.

9. The Staff Association argues that the successive legal positions taken by the Health Unit effectively blocking the establishment of a board of arbitration reflect an attempt by the Health Unit to strip the Staff Association of its right under Article 13 of the collective agreement to refer the settlement of a new collective agreement following unsuccessful negotiations to a board of interest arbitration. Counsel contends that it has a right to have the Board constituted and that if the Health Unit disputes the jurisdiction of the board of arbitration it should make that argument before the board in the form of a preliminary objection. To block the appointments necessary to constitute the board in the first place is, the union argues, a violation of section 70(1) of the Act.

10. Counsel for the Health Unit on the other hand contends that the employer cannot be in violation of section 70 of the Act solely by taking certain legal positions, that is, by disputing that it has a legal obligation under the collective agreement to name a nominee to a board of arbitration or by asserting that the Minister of Labour would be without jurisdiction to make the appointments or by contending that the Labour Relations Board lacks jurisdiction to advise the Minister as to whether or not he has jurisdiction to make the appointment. Without commenting on the validity of the argument we note counsel's further contention that if the employer makes the appointments necessary to constitute a board of



arbitration the privative clause in Article 13 would preclude the employer from later disputing the constitution of the board or its proceedings. More generally, counsel for the employer contends that it would far exceed the intended scope of section 70 of the Act if contesting one's legal obligations under a collective agreement or asserting one's legal rights could place a party in violation of the Act.

11. Is there a right flowing from Article 13 of the collective agreement and preserved by section 70(1) of the Act for either party, in the face of unsuccessful negotiations, to have a board of interest arbitration constituted either by the parties themselves or by the Minister of Labour? Is it a violation of section 70(1), in other words, for the employer to at one time refuse to make the appointments required to establish a board of arbitration, dispute the Minister's jurisdiction to do so, and contend that this Board is without jurisdiction to advise the Minister as to whether or not he has the authority to make the requested appointment?

12. Upon the giving of notice by either party of its desire to submit to arbitration the negotiation of a new collective agreement, Article 13 stipulates that the recipient of the notice advise the other party whether or not the first party's appointee is acceptable as a single arbitrator. If the appointee is not acceptable Article 13 provides that the recipient advise the other party of the name of its appointee to an arbitration board and the party who first sent the notice is to then advise the other party of its appointee to the arbitration board. The two nominees so selected are then directed to select a third person to act as chairman. Once notice has been given, therefore, these provisions of Article 13 direct the respective parties to take the steps necessary to constitute a board of arbitration.

13. Article 13 further provides for the course of conduct to be followed in the event that either party fails to make the appointments required to constitute a board of arbitration. In the event that the recipient of the notice, in this case the Health Unit, fails either to approve the single arbitrator or appoint a nominee, or if the two appointees fail to agree upon a chairman (all of which the Health Unit failed to do in this instance), Article 13 stipulates that the appointment shall then be made by the Minister of Labour upon the request of either party.

14. While the Staff Association argues that the Health Unit has acted contrary to the terms of Article 13 of the collective agreement by failing to take the steps necessary to constitute a board of arbitration, a failure of this nature is anticipated by the express terms of the collective agreement. Article 13 provides a resolution for this kind of impasse by authorizing the Minister of Labour upon the request of either party to make the necessary appointments. The employer's refusal in this case to make the required appointments has brought into play the impasse-breaking mechanism agreed upon by the parties and incorporated into Article 13.

15. Because the employer's refusal to make the appointments necessary to constitute a board of arbitration has been expressly anticipated by the collective agreement, it would, in the Board's view, unreasonably stretch the terms of the collective agreement to suggest that there is a right flowing from Article 13 and preserved by section 70(1) of the Act which guarantees that the recipient of the notice to invoke interest arbitration will, despite legal objections relating to its obligation to do so, make the appointments necessary to constitute a board of arbitration. The employer's refusal to make the required appointments has been anticipated by the parties, and cannot, therefore, be characterized as an attempt to alter un-

ion rights under the collective agreement in violation of section 70. The right contained in Article 13 which would be preserved by section 70(1) is a right to ask the Minister of Labour to make the required appointments in circumstances where the other party has refused to do so. This right has been exercised by the union without objection from the employer.

16. The union has requested the Minister to make the appointment necessary to constitute a board of arbitration. The Minister has referred to this Board pursuant to the provisions of section 96 of the Act the question of whether or not he has the authority to comply with the union's request. In a decision released this day (File No. 2172-78-M) the Board, for the reasons set out in a previous decision, *Haldimand-Norfolk Regional Health Unit*, [1978] OLRB Rep. Feb. 197, held that because the board in question is a board of interest arbitration rather than a board of rights arbitration it is without jurisdiction to advise the Minister as to whether or not he has jurisdiction under the collective agreement to make the requested appointment. The employer's reliance on this precedent in disputing the Board's jurisdiction to advise the Minister can hardly be viewed as a violation of section 70.

17. The matter now rests with the Minister pursuant to the terms of the collective agreement. The union alleges that the employer's contention that the Minister is without jurisdiction to make the appointment is further evidence of its attempt to take away the union's right to establish a board of arbitration in contravention of section 70(1) of the Act. The employer, in refusing to appoint a nominee, in arguing that the Board was without jurisdiction to advise the Minister pursuant to section 96 of the Act and in challenging the Minister's authority under the collective agreement to in fact make the appointment, is putting the effectiveness of Article 13 to a rigorous test. Article 13 on its very face, however, raises obvious questions of enforceability. We are not faced in this case with contract language which requires the parties to make a joint request as might restrict the right of the employer to argue against the jurisdiction of the Minister under the terms of the collective agreement to make the requested appointment. There is nothing before us to cause us to conclude that the employer is estopped from making whatever legal arguments are at its disposal in support of its view as to the effect of Article 13 in the circumstances of this case.

18. The union's right under the collective agreement and preserved by section 70(1) is, failing mutual agreement, to request the Minister to make the appointment. The exercise of that right has not been impaired by the employer. In the result we conclude that the employer has not acted in contravention of section 70(1) of the Act. Accordingly, the complaint is dismissed.

#### **DISSENT OF BOARD MEMBER M. J. FENWICK:**

1. The collective agreement between the employer and the union had for many years contained a procedure whereby all unresolved collective bargaining disputes could be submitted to arbitration. This method of collective bargaining dispute resolution, voluntarily agreed to by both the employer and union, is particularly commendable for this bargaining unit, since a strike or lock-out would deprive the citizens of the community of the services provided by the employees of the Health Unit.

2. The union here is attempting to continue the arbitration procedure as the method for resolving collective bargaining differences. It is the employer who is blocking the union's access to arbitration by raising technical obstacles to the formation of an arbitration board

while it is the employees who wish to continue working in the community pending the resolution of a new collective agreement.

3. In my view the use of economic sanctions are not appropriate in this collective bargaining context, and up until the employer attempted to back away from the arbitration process, both the union and the employer thought arbitration was the best way to resolve their differences. I believe that Article 13 of the collective agreement reflected that earlier position.

4. While I recognize that a strict legal interpretation of the collective agreement may result in the inability of the union to force the employer to arbitration, I am of the opinion that the employer has contravened the spirit, if not the letter, of the agreement, by depriving the union of its right to go to arbitration. Since this right was in place prior to the expiry of the agreement, and was therefore frozen by section 70, I am of the opinion that the conduct of the employer has violated the Act. I would direct the parties to submit all their unsettled contract renewal items to arbitration.

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**1071-79-R** Labourers' International Union of North America, Local 183, (Applicant), v. **Industrial Lighting and Contracting Limited**, (Respondent).

**Certification – Construction Industry – Jurisdictional Dispute – Possibility of jurisdictional dispute – No bar to certification – Certification proceedings not determining jurisdictional limits in construction industry**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

**DECISION OF THE BOARD;** October 4, 1979

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4. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

5. Although the respondent did not file a reply, it did file a letter indicating its concern that certification of the applicant might result in jurisdictional disputes between the applicant and the International Brotherhood of Electrical Workers. While we can understand this concern, we are of the view that the possibility of such disputes is not a proper basis for denying a certificate to the applicant. Further, we do not regard a certification proceeding as an appropriate mechanism for determining the jurisdictional limits of trade unions in the construction industry. However, should any difficulties arise in the future concerning jurisdictional disputes which the parties themselves cannot resolve, then recourse can be had to the jurisdictional dispute provisions set out in section 81 of the Act.

6. The Board further finds that all construction labourers in the employ of the re-



spondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

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8. A certificate will issue to the applicant.

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**0365-79-U** George Maglasis & George Papoutsis, Complainants, v. International Ladies' Garment Workers' Union, Respondent, v. **Irving Posluns Sportswear**, Intervener.

**Duty of Fair Representation – Practice and Procedure – Board barring portion of complaint due to extreme delay – Delay considered in determining appropriate relief**

**BEFORE:** E. Norris Davis, Vice-Chairman

**APPEARANCES:** *Alex Farquhar for the complainants; Beth Symes, Wm. Villano and John Hammond for the respondent; E. L. Stringer, Q.C. and Wayne Hartle for the intervener.*

**DECISION OF THE BOARD;** October 24, 1979

1. The complainants filed a complaint on May 25, 1979 alleging contraventions of section 60 of the Act in that the respondent was guilty of arbitrary, discriminatory or bad faith representation of the complainants in respect to claims for overtime periods relating to unspecified occasions from 1971 and up to the time of their termination of employment in July 1978; and further allegations of similar improper representation of the complainant, George Maglasis in respect to compensation following his discharge and re-instatement in employment in 1976; and further allegations of similar improper representation of both complainants in respect to their discharge from employment in July 1978; and further allegations of improper representation of the complainants' claim for severance pay under *The Employment Standard Act*. This last allegation was abandoned by the complainants at the hearing.

2. The Board made an oral ruling refusing the complainants' request to join the intervening employer as a respondent.

3. The respondent and the intervener both raised preliminary objections to the Board's entertaining of this complaint in view of the length of time elapsing between the events to giving rise to the complaint and the commencement of this proceeding. The respondent further raised a preliminary objection to the lack of particularity in respect to those allegations arising out of non-payment for overtime commencing in 1971 and continu-

ing through 1978. The Board ruled that it would hear evidence as to the reasons for failure of the complainants to have moved more expeditiously in bringing the matter before the Board.

4. Maglasis testified that in respect to overtime he didn't remember the dates of any complaints he made but that "we always complained" to Villano, the Manager of the Union and to a Business Agent. He testified to one specific meeting with union officials in 1976 which resulted in the union being instrumental in shutting off the electrical power in the plant during the one hour lunch period and at 4:00 p.m. (the normal quitting time) and that effectively precluded the working of overtime for a period of 1½ months. Maglasis testified that between 1976 and the date of his discharge in 1978 he complained many times to the Business Agent or the Manager of the union on their weekly visits to the plant and received the response that the company didn't pay overtime so don't work if you don't want to.

5. Papoutsis' evidence corroborates the 1976 incident and when asked if he continued to complain thereafter he stated, "not too much. We going to be out of a job". He further testified that he never took any action other than complaining to the union many times and that the Manager of the union always said, "We going to fix the problem. Don't worry. So I wait – he knows his job". On cross-examination Papoutsis stated that if he had not been discharged in 1978, he would not have taken any action in regard to overtime other than to wait for the union.

6. In 1976 there was a dispute over piece rates and Maglasis was discharged for failing to continue to work while the dispute was discussed and as a result Papoutsis and the remaining two pressers walked off the job and all four of them went to the union office and informed Villano, the Manager of the union. Papoutsis states that the four of them continued to talk with Villano during the following week and that at the end of the week Villano informed them that the company had agreed to take back all pressers except Maglasis. Papoutsis and the others refused to accept a settlement unless all four were returned to work, and on the following Monday at a meeting of all four and Villano with the company, the negotiated settlement did return all four to work without compensation for lost time. Maglasis in his evidence stated that he never made any further complaint to Villano about this incident. Papoutsis gave no evidence of any further complaint in respect to this matter.

7. In 1978 about 1 or 2 months prior to the discharge of the complainants, according to Maglasis, the company cut some of the piecework prices and the employees complained to the union as a result of which the Business Agent went into the plant and "froze the prices". Maglasis states he never complained about the prices again because no work of that type was again done but states he never received any adjustment for work already done. Maglasis' version of the events of July 14, 1978 when both complainants were discharged was that the Manager of the company fired them, and that "the police came and took us out, and we went with Hank (the Business Agent) to the union office around noontime". At the union office they saw Villano later in the day and he suggested they return next day which they did and which they continued to do for the rest of the week. On Thursday of that week because the plant would be closed for vacations for three weeks Papoutsis told Villano they wanted to know whether they would return to work or whether they should "look for another job or go to Greece for a holiday". On Friday the Business Agent informed Maglasis and Papoutsis that the company was saying "No", and in Papoutsis' words, "so for me the matter was finished". According to Maglasis, Villano offered to send them to another job.

He also admits that Villano, at this time, could have told them to return on August 14th to the Union office.

8. The same day, July 21st, 1978, the complainants went to the Unemployment Insurance Office and secured forms to file a claim. They then visited the offices of this Board, got necessary books and forms to file a section 60 and received information about the Employment Standards Branch. Maglasis testified that both he and Papoutsis had also been in the Labour Relations Board offices on two other occasions, once after his discharge in 1976 and again in connection with the discharge of some other employee.

9. Maglasis and Papoutsis then went to the Employment Standard Branch and filed a complaint claiming severance pay, wages due in respect to piecework rate changes and overtime premiums. This complaint was denied by letter on November 22, 1978, and through their local M.P.P. a request for review was made December 4, 1978 and refused on December 13, 1978. On January 5th, 1979 the complainants were in touch with the Ombudsman's office and it appears that file is still open.

10. Maglasis admits receiving a telephone call from one, Grogan, in the Montreal office of the respondent. This call was one or two weeks after the vacation shutdown at the intervener's plant, and in the course of which Grogan offered to have Maglasis sent to another job with another employer, which offer Maglasis refused. Maglasis states that in this conversation he complained about not having been paid for certain work tickets and as a result he did receive such payment.

11. Maglasis states also that around this time he happened to meet Villano in the Department of Labour offices and inquired about termination pay and was advised to go to the "Labour Board" and that Villano could do nothing.

12. The complainants sought the services of Legal Aid in respect to the section 60 matter but were disqualified because of their financial condition, and consulted another lawyer about two weeks later, leaving the section 60 application forms with him. After a wait of some weeks they further talked to this lawyer who advised they should sue their employer which advice they disagreed with and terminated their relationship. They then returned to the Labour Board and secured additional forms of which Maglasis says "maybe we kept them in the car for a couple months". Papoutsis on evidence in chief when asked "Why so long to eventually make a complaint to the Labour Relations Board?", responded, "Because we are asking people. We did not know the right door to knock on. By getting advice we find out what we supposed to do". According to Papoutsis the second set of forms were turned over to their present lawyer in April 1979.

13. The most recent circumstances giving rise to the allegations in the complaint are those surrounding the discharge from employment on July 14th, 1978. The evidence was that on the same day (July 21st) as the complainants were advised by the Manager of the union that he had not been successful in reversing the discharge decision, they attended at the offices of the Labour Relations Board and were provided with information (oral and in booklet forms) relating to available relief under the Act. Throughout the period following the July 21st, 1978 discharge, there was no evidence to suggest that the complainants were pursuing anything other than what they considered to be their monetary claims arising out of claimed overtime and piece-work rate discrepancies and severance pay arising out of the



July 1978 termination. It was not until some two months following the final adverse determination by the Director of Employment Standards that attention was directed to the possibility of re-instatement in employment. At the request of the complainants, their local M.P.P. on February 21, 1979 wrote a letter to William Villano and a copy to the International President of the respondent, and reading as follows:

“Attached please find a copy of the letters from the Minister of Labour dated December 13, 1978. I am completely distressed, by the fact that, the Union did not launch a grievance under the terms of the Collective Agreement, in order to defend the claimants.

If the time hasn't lapsed, I'm urging you to take this case before the Labour Board in order to deal with this particular issue.

I would appreciate an immediate reply because I truly sympathise with the claimants.”

As a result of this Maglasis received a telephone call from his M.P.P. who said he had received a call from Villano that he could get the complainants' back to work. The complainants went to the union office 1 or 2 weeks after the letter and Villano said he was going to take them back to work. The complainants stated they would only return to work if they were paid for lost time from the date of their discharge. Villano refused to advance that proposition as in his opinion the Company would not pay. The complainants appear to have accepted that position and in Maglasis' words, “We said OK. You are the only one to take our case to the Labour Board” and Villano is said to have replied, “No, I won't do that either”. Maglasis then said he would call the Union Head Office to get our case to the Labour Board to which Villano replied, “OK call the Head Office”. Maglasis states no call was made to the Union Head Office “Because we get the case to a lawyer”, which action was taken sometime in April 1979 by retention of present Counsel.

14. The issue which the Board must determine is whether this complaint has been brought on a timely basis having regard to all the circumstances of this case. This issue was recently dealt with by the Board in the *Concrete Construction Supplies* [1979] OLRB Rep. Aug. 739 in which the Board said,

“... It is not the practice of this Board to bar complaints under Section 79 unless there has been extreme delay. In the case of complaints involving alleged violations of Section 60, the Board's practice has usually been to hear the complaint and consider delay, if it is unreasonable, when considering the relief to be given. In this case, the delay is not extreme and will not bar the complaint from being heard.”

15. In the instant case the allegations of improper representation by the respondent union are founded, in part, in the general allegation, without specificity, that complaints about non-payment of overtime premiums were not settled in the complainants' favor and these complaints are of a continuing nature going back to 1971 (eight years prior to the institution of these proceedings). The Board notes, in passing, that the collective agreement provides a one step grievance procedure, prior to arbitration, in which any dispute is to be negotiated between the Association and the Manager of the union. The evidence is that

complaints were made frequently prior to 1976 to the Business Agent and to the Manager of the union and were discussed at union meetings which the complainants regularly attended. In 1976 the union took forthright step of eliminating such complaints by shutting off the plant power and making overtime work impossible. The complainants' position, as we understand it, is that no thought was given to initiating a section 60 complaint at that time either because they were waiting for the union to secure a favourable settlement or because of an atmosphere prevailing in the plant that to take such a positive step would affect either their job security or the availability of work to them through the hiring of additional workers. It must be noted that this conclusion was admitted not to have been based on any statement made to the complainants by anyone. In our view, having regard to the circumstances, including the lack of particularity relating to the incidents which were the subject of the employees grievance and the lack of particularity as to the events which are alleged to have been the basis for a charge of misconduct against the respondent and the culminating events of 1976 we find the delay in seeking the Board's remedial relief to have been extreme. The Board exercises its discretion under Section 79 and refuses to entertain the complaint in respect to these items.

16. The complainants advance similar arguments in respect to the delay in making charges in respect to payment for lost wages involved in the re-instatement following discharge in 1976 and in respect to failure to secure a favourable settlement of some reduced piecework rates which were a factor in such discharge. It is our view of the evidence that following the complainants' re-instatement in employment in 1976 no further request was made by them to the Union in respect to payment for lost time or in respect to the piece rate matters, and that these matters were not raised by the complainants in their discussions with the Union at the time of their July 21, 1978 discharge, but were just raised, following 1976, by the filing of these proceedings. Under all the circumstances we find this to be an extreme delay and the Board exercises its discretion under Section 79 and refuses to entertain the complaint in respect to these items.

17. As to the discharge from employment in 1978 and allegations that the respondent acted improperly in the representation of the complainants' grievance we are of the opinion that while the delay in seeking remedial relief is totally unexplained, certainly from the period following the discussion flowing out of the letter of February 21, 1979 up to the actual filing of the complaint on May 25, 1979, we are reluctant to refuse to hear the matter on its merits. We find the delay to be not so extreme as to cause us not to entertain the complaint itself, but to be taken into consideration by the Board in determining the relief to be given in the event that the complaint is determined to be well-founded. The Board will therefore hear the complaint in respect to allegations of improper representation of the grievors by the respondent in respect to their discharge from employment on July 21, 1978.

18. The matter is referred to the Registrar who is directed to list it for hearing.

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**0642-79-U** Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **J. H. Normick Inc.** (Kirkland Lake Division), Respondent.

**Lock-Out – Employer moving operations outside geographic scope of union’s bargaining rights – Employer sub-contracting work – No express or implied term of employment that employer hiring former employees in new location – Whether lock-out**

**BEFORE:** Ian C. A. Springate, Vice-Chairman.

**APPEARANCES:** *H. M. Pollit, Yvon Desroches and Norman Rivard for the applicant; K. R. Valin, Mike Roy, Don Farrell and Fred Burrows for the respondent.*

**DECISION OF THE BOARD;** October 5, 1979

1. This is an application for relief under section 83 of *The Labour Relations Act* in which the applicant alleges that the respondent engaged in, or threatened to engage in, an unlawful lock-out.

2. The respondent holds a number of timber-cutting licences covering large areas of Northern Ontario. In the early part of 1979 it had approximately 24 employees engaged in a cutting operation in Blain Township in the District of Temiskaming. These employees were split almost evenly between cutters and skid operators. On April 10, 1979 the Board certified the applicant as the bargaining agent for the respondent’s employees in the Township of Blain and the immediately adjacent townships.

3. On or about June 21, 1979 the respondent informed its employees in Blain Township that the cutting operation in Blain was about to come to an end because the respondent had cut the maximum amount allowed for in the Township under its licence with the Ministry of Natural Resources. The employees were also informed that the respondent was about to commence cutting in Midlothian Township some 40 miles distant. Midlothian is outside the geographic scope of the bargaining unit earlier certified by the Board. It was explained to the employees that in Midlothian Township the respondent would not be employing direct hires but instead would be working through a contractor, Mr. L. P. Turgeon. Those of the employees who were skid operators were advised by the respondent that if they so desired they could work for Mr. Turgeon as sub-contractors, and in this regard the respondent’s foremen handed out copies of a standard form agreement with Mr. Turgeon which they could sign. Mr. Marcel Roy, the respondent’s lands manager for its Kirkland Lake Division, testified that it was made a condition of Mr. Turgeon getting the cutting contract that he give the respondent’s employees from Blain first chance to work for him in Midlothian Township as sub-contractors.

4. Each standard form agreement is stated to be between Mr. Turgeon as contractor and an individual “broker”. It indicates that a broker, (i.e., a skid operator) is free to hire employees of his own. Presumably a skid operator would want to hire a cutter to assist him. The evidence is that most of the employees who worked for the respondent in Blain Township also worked in Midlothian Township. From this one can reasonably conclude that most, if not all, of the skid operators from Blain signed a standard form agreement with Mr. Turgeon and arranged for a cutter from Blain to accompany them to Midlothian Township.



5. Mr. F. Burrows, the Vice-President of the Woodlands Division of Normick-Parent, the respondent's "parent" firm, testified that the respondent employs three different methods to get its cutting work done, namely:

- 1) using its own employees. In certain locations these employees are covered by the terms of a collective agreement;
- 2) contracting the work out to another logging firm, and
- 3) contracting the work out to a contractor who in turn is responsible for engaging sub-contractors.

According to Mr. Burrows a number of considerations are taken into account in deciding which of the three methods will be used for a particular cut, including site location, availability of manpower, availability of contractors and the economics involved. Mr. Burrows testified that it was only these considerations which caused the company to decide to have its Midlothian cut performed through a contractor. Mr. Burrows' testimony in this regard was neither challenged in cross-examination nor contradicted by evidence called by the applicant.

6. There is no question but that at the relevant time a lock-out would have been untimely and hence unlawful. Section 1(1) (i) of the Act defines a "lock-out" in the following terms:

" 'lock-out' includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees."

7. There is no question but that the respondent closed down its cutting operations in Blain. However, for this to have constituted a lock-out the respondent's actions must have been motivated by a desire to compel or induce his employees to refrain from exercising rights or privileges under the Act or to agree to provisions, or changes in provisions, respecting their terms or conditions of employment. The uncontradicted evidence before the Board is that the respondent only ceased its cutting operations in Blain because it had cut the maximum amount allowed under its licence. In these circumstances the Board is satisfied that the respondent's actions in closing down its cutting operations in Blain did not constitute a lock-out, but instead came within the provisions of section 68 of the Act, which states as follows:

"Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out of strike."

8. The applicant contended that the respondent's decision not to use direct hire em-

ployees in Midlothian Township was motivated by a desire to avoid a possible certification application with respect to the township. Presumably the applicant's view was that this amounted to a refusal by the respondent to continue to directly employ the employees in Midlothian with a view to compel them to refrain from exercising a right under the Act, and hence constituted a lock-out. Although in the appropriate case the Board is prepared to infer that the contracting out of work was motivated by a desire to avoid a union certification, (see *Dr. Hillers Peppermint Canada Limited*, [1979] OLRB Rep. May 385), the evidence here simply does not support such an inference. Indeed the only evidence before the Board on this point is the uncontradicted testimony of Mr. Burrows that the decision was made for other reasons entirely and in accordance with established company practice. Accordingly, the Board is not satisfied that the respondent's decision not to use direct hires in Midlothian Township was done to compel employees to refrain from exercising any right under *The Labour Relations Act*.

9. The main argument put forward by the applicant was based on its contention that notwithstanding the "form" of the relationship between the respondent, Mr. Turgeon, and the individual workmen, in fact the individuals engaged in the cutting work in Midlothian Township remained employees of the respondent for the purposes of *The Labour Relations Act*. It contended that when the respondent indicated to the employees that they could only continue to work for it in Midlothian under the terms set forth in the standard form contract with Mr. Turgeon, its actions either amounted to, or were a threat of, "a refusal by an employer to continue to employ a number of his employees with a view to compel or induce his employees ... to agree to provisions or changes in provisions respecting terms or condition of employment ..." and as such came within the definition of a lock-out.

10. The issue of whether or not the individuals working in Midlothian Township are "employees" of the respondent for the purposes of *The Labour Relations Act* is currently before the Board in other proceedings in which Mr. Turgeon has been named as a party. However, for the purposes of these proceedings the Board is prepared to assume, without so finding, that the applicant is correct in its contention that the individuals involved remain employees of the respondent.

11. On the basis of this assumption, there can be no dispute but that the respondent refused to continue to employ its employees at Midlothian under the same terms and conditions as before. However, there is absolutely nothing before the Board to indicate that it was an express or implied condition of employment of the employees in Blain Township that when the cutting operation there came to an end they would continue to be employed elsewhere by the respondent under the same terms and conditions. Indeed the evidence of Mr. Burrows indicates that the terms under which individuals work depend on whether the respondent decides to do the work with direct hires or through a contractor. In these circumstances the Board is not prepared to assume that the terms and conditions under which the employees worked in Blain Township were meant to cover, or were understood by the employees as covering, cutting operations 40 miles away in Midlothian Township. Accordingly, the setting of terms and conditions of employment for Midlothian Township would appear not to have involved the changing of any applicable terms and conditions but rather the establishment of new terms and conditions for an area where none had previously existed. Accordingly, the Board is satisfied that the indication to employees that they would not be employed in Midlothian Township under the same terms as they had been in Blain could not amount to a lock-out under the Act.

12. Having regard to the above, the application is hereby dismissed.
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**0835-79-R** Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Kafko Manufacturing Limited**, Respondent.

**Appropriateness – Bargaining Unit – Certification – Only students employed – Whether constituting appropriate unit – Students and part-time employees described as appropriate unit – Whether absence of history of part-time employees affecting bargaining unit description**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine.

***APPEARANCES:** Louie Douramakos for the applicant; G. Grossman and W. Kindness for the respondent.*

**DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD, AND BOARD MEMBER C. A. BALLENTINE; September 26, 1979**

1. This is an application for certification.

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3. The applicant is seeking to be certified for a bargaining unit comprised of all employees who work for the respondent for not more than 24 hours per week ("part-time employees") and students employed during the school vacation period ("students") save certain exclusions not here relevant. The applicant presently holds a certificate issued by the Board on June 29, 1979 which grants it bargaining rights for an all employee type of bargaining unit (see Board File No. 0425-79-R). In that decision to certify the applicant, the Board accepted the description of the appropriate unit which had been agreed to by the parties and which excluded part-time employees and students. It is that group of employees for which the applicant is now seeking to be certified as bargaining agent.

4. The respondent seeks to have the application dismissed because, there being no part-time employees at the date of application and no history of them being employed by the respondent, the bargaining unit would be comprised of students alone, which the respondent submits would not be an appropriate bargaining unit.

5. The respondent is a manufacturer of swimming pools. Since its period of peak business activity generally corresponds with the school summer vacation period when students are available, it augments its regular work force of 30 to 35 employees by employing students. At the time of this application, the respondent was employing 11 students, thus its work force had been augmented by some 30 to 35 per cent. There is no carry-over of the students employed in one year to the following year.



6. The respondent argues that the short-term nature of the employment relationship and the constant change in the applicant's membership constituency is an obstacle to establishing a viable bargaining relationship. These are the circumstances which, the respondent contends, make a unit comprised only of students one which is not appropriate for collective bargaining purposes. The applicant argues on the other hand that the employees have a right to be represented in collective bargaining with their employer for purposes of determining their working conditions and they should not be denied that right simply because they are students working during their summer vacation. The applicant contends that this is particularly true in the instant case because the students make up a significant part of the total work force at a critical time in the respondent's annual business cycle.

7. When the Board is dealing with part-time employees and students in terms of how a bargaining unit should be described, as a general rule, it has taken the view that these two groups of employees share a sufficient community of interest to constitute an appropriate bargaining unit separate from the full-time employees. For that reason, the Board follows the practice of dealing with these two groups in tandem whenever it is asked by an applicant or a respondent to include in or exclude from a unit either group. In other words, if a party is seeking to exclude part-time employees and the Board grants the request, it will exclude students also. This latter practice has developed as well from the Board's desire not to subdivide the employees of an employer into a number of separate units in a way which might impede the collective bargaining process and from its belief that students alone may not constitute a bargaining unit that is viable for collective bargaining purposes (see, for example, *Plummer Memorial Public Hospital*, [1979] OLRB Rep. May 433). This belief would seem to support the respondent's contention that the unit sought, however described, is comprised only of students and therefore cannot form an appropriate bargaining unit. The respondent then argued that the lack of appropriateness leads automatically to dismissal of the application. This result, in the circumstances of this case, would have the effect of denying students employed by the respondent any right of self-organization, a right declared by section 3 of the Act, because there is no evidence before the Board that there are other employees of the respondent who share a sufficient community of interest with the students to be joined with them in a unit.

8. Since the Act does not exclude students from its coverage, the Board has presumed that the Legislature intended that they be covered (see *The Victoria County Board of Education*, [1975] OLRB Rep. June 529, and also *St. Raphael's Nursing Homes Limited (Kitchener)*, [1977] OLRB Rep. Sept. 580). Thus to allow the respondent's submission would lead to a result contrary to the purpose of the Act by depriving employees of the respondent who are students employed during the school vacation period access to collective bargaining. The right of access to collective bargaining must be given precedence even though, in the circumstances of this case, the only bargaining unit available at the day of application, however it is described, is one comprised solely of students.

9. For the foregoing reasons and having regard to the Board's general practice of describing a bargaining unit in terms of both part-time employees and students if either one or the other group is present, the Board finds that all employees of the respondent at its plant in Mississauga, Ontario, who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foreman, those above the rank of foreman, office and sales staff, constitute the unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on August 14, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

12. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

13. The matter is referred to the Registrar.

14. Decision of Board Member, H. J. F. Ade to follow.

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**1189-79-R The Canadian Union of Public Employees, Applicant v. Macdonnell Memorial Hospital, Respondent**

**Certification – Practice and Procedure – Notice of application posted 2½ days prior to expiry of terminal date – Employer seeking extension of terminal date – Employer claiming employees had insufficient notice – Whether date extended**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members F. W. Murray and H. Simon.

**APPEARANCES:** *Helen Browne for the applicant; S. C. Bernardo and Ruth MacDonell for the respondent.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER H. SIMON; October 25, 1979**

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2. This is an application for certification.

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5. Counsel for the respondent notified the Board by telegram dated October 1, 1979 that the posting of notice of hearing in this matter had not been made until 11:00 a.m. on September 26, 1979 and asked that the terminal date of September 28, 1979 be extended to October 12, 1979 because of a lack of notice to employees in the bargaining unit. Counsel for the respondent was advised to appear at the hearing and make his representations to the

panel assigned to the case. He argued that only one-third of the employees in the bargaining unit (part-time employees) were scheduled to work during the period of the posting and renewed his request for an extension of the terminal date. He acknowledged that during the period from the posting to the date of hearing (October 9, 1979) only one half of the bargaining unit employees had been scheduled to work and that if the terminal date had been extended to October 12, 1979, as he had requested in his telegram, more than 60 per cent of the bargaining unit employees would have been scheduled to work during the period of the posting. While the Board has been prepared to look to the sixty day period before and after the application date in determining if part-time employees are eligible for purposes of the count, the Board has never extended the posting period in applications involving part-time employees. For purposes of posting, part-time employees not scheduled to work during the period of posting are no different than full-time employees who are off sick, on vacation, layoff or away from work for other reasons during the period of posting. In all certification cases the Board is faced with the dilemma of notifying all those who may be affected within the narrow time constraints which exist in any application for certification. The present application is a case in point. If the Board wanted to be certain that all those affected were actually scheduled to work during the period of posting it would have had to have extended the terminal date for a period of weeks and even then a number of employees might not have been scheduled to work. The Board, however, does not concern itself with whether or not employees are scheduled to work. The Board posts the notice of application and hearing in the workplace in expectation that the employees affected will either see the notice or be advised of its contents by a fellow employee who has seen it and in this way satisfies itself that those who may be affected have been notified. The Board, however, is always prepared to entertain the representations of individual employees who may have been disadvantaged by a lack of notice. In this case none of the bargaining unit employees appeared before the Board although the hearing was held some 14 days after the posting.

6. The Board has consistently held in certification matters that three day's notice prior to the terminal date, which is in turn at least 1 week prior to the hearing date, is sufficient notice. In this case the notice was posted mid-morning on September 26th allowing the remainder of that day, September 27th and September 28th for the filing of interventions. In the absence of representations from any of the employees in the bargaining unit the Board, with Mr. Murray dissenting, hereby reiterates its oral decision given at the hearing not to extend the terminal date.

8. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER F. W. MURRAY:**

1. I dissent.

2. I would not have abridged the Board's usual time period of 3 days' notice prior to the terminal date. As a result I would have extended the terminal date and relisted the case for hearing.

3. I would not conclude that the failure on the part of members of the bargaining unit to appear and make representations should lead the Board to conclude that reasonable notice was served. The Notice to Employees is in one respect at least quite clear, namely that failure to respond by the terminal date will result in the Board setting aside any representations that may subsequently be made.



4. In the case before the Board the employees had at best 2½ days' notice before the terminal date.
5. I do not believe this allows sufficient time for those who wished to respond to do so.
6. I am aware that an employer could delay the Board's procedure by merely failing to post the notice promptly. It is a case such as this that might cause the Board to abridge the 3 day limit in the absence of any representations from those in the bargaining unit.
7. However, my notes indicate that the notice was received by the respondent late one afternoon and was not seen by anyone in authority until the next day when it was posted at 11:00 a.m.
8. I would have concluded that this was reasonably prompt action in all the circumstances.
9. The difficulty may lie in the Board assuming that our delivery systems are faster than what in fact they are. In any event I would have extended the terminal date and put the case on for re-hearing at the earliest possible date, however ensuring that the employees had 3 clear days in which to respond to the application.

**0317-79-U Retail Clerks Union, Local 206, Complainant v. Makita Power Tools Canada Ltd., Respondent.**

**Discharge for Union Activity – Grievor junior employee with poor work record – Employer advancing credible reasons unrelated to union activity for discharge – Presence of anti-union animus considered but not determinative of issue**

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members C. Ballentine and F. W. Murray.

**APPEARANCES:** *T. Wohl, B. Andrews, P. Mettmann and Pat Bailey for the applicant; Michael G. Horan for the respondent.*

**DECISION OF G. GAIL BRENT, VICE-CHAIRMAN AND BOARD MEMBER F. W. MURRAY; October 15, 1979**

1. The complainant has complained that the grievor was dealt with by the respondent contrary to sections 56, 58, 58(a), 60, 61 and 70(1) and (2) of the Act and requests that the grievor be reinstated with compensation.
2. At the commencement of proceedings counsel for the respondent submitted that the complaint should be dismissed for lack of particulars, and because the complaint did not disclose a violation of *The Labour Relations Act*. Paragraph 4 of the complaint reads as follows:

“On or about May 15, 1979 the grievor was dealt with by H. Suzuki, V.P., Makita Power Tools, Canada, Ltd. contrary to the provisions of sections 56, 58, 58(a), 60, 61, 70(1), (2) of *The Labour Relations Act* in that he did on his own behalf or on behalf of the respondent terminate the respondent [sic] because he is a member of a trade union and imposed conditions on the employee because he is a member of the Union. The Company was fully aware that an organizing program was successfully certified [sic] and knew that the aggrieved employee was a union member, active on the organizing committee and appeared on behalf of the applicant at the Board’s certification hearing.”

Counsel for the respondent informed the Board that he had requested particulars on or about June 5th and that on June 15th he received some particulars which he submitted did not comply with the Board’s requirements.

3. Counsel for the complainant submitted that the only violation alleged was a violation of section 58(a) in that the grievor was discharged for union activity. The particulars supplied went to conduct which would show a pattern of anti-union conduct on the part of the respondent.

4. The Board ruled that the complaint on its face does allege a violation of the Act. The Board further ruled that it would proceed on the basis of the particulars supplied and adjourn, if necessary, if the respondent was taken by surprise by any matter not dealt with sufficiently in the particulars.

5. The Board heard evidence and argument from the parties during four days of hearings. The evidence of each of the parties will be summarized in the following paragraphs before the Board states its conclusions and decision.

6. The respondent is located in Scarborough and is in the business of importing electric power tools, as well as parts and accessories for those tools, from Japan and distributing them throughout Canada. There are about ten people employed on the premises including all management, sales and office personnel, as well as those employed in taking and shipping orders. The grievor was hired on or about March 7, 1979 and was discharged by letter dated May 14, 1979 (Exhibit #1) and given to the grievor on or about May 15, 1979.

7. The evidence tendered by the respondent was that the grievor was hired to work in the warehouse to ship tools and do other jobs as required. The respondent was organized in such a fashion that the most junior person there, the grievor, was expected to take direction from everyone else. It is clear that there was no chain of authority as one would understand it in the traditional sense, but that anyone senior to the grievor could tell him what to do and that employees were expected to fill in as needed.

8. Messrs. Suzuki and Fujiwara were two senior officials of the respondent who were present when the grievor was hired and they both testified that at the time of hiring the grievor was told that he would be on probation for three months and might possibly be let go if his work was not satisfactory. All of the respondent’s witnesses who were familiar with the grievor’s job performance testified that when the grievor began his performance was satisfactory but that they noticed a deterioration in his performance after the first few weeks.

9. Mr. Murphy, who is also a member of the bargaining unit, testified that in the course of his work he receive complaints from customers and salesmen about the shipments sent by the respondent. He further testified that he began receiving complaints about the shipments the grievor was responsible for after the first month of the grievor's employment. He passed these complaints along to Mr. Suzuki and also spoke to the grievor about them. Mr. Murphy characterized the complaints as being for careless packing and shipping. Mr. Murphy said that he regarded his conversations with the grievor about these complaints as being by way of "constructive criticism."

10. Mr. Fujiwara, who is the general manager of the respondent, testified that he became dissatisfied with the grievor's work performance after the first few weeks and on at least two occasions before April 20th told the grievor that if his poor work performance continued he would have to leave. Mr. Fujiwara said that he noticed that the grievor was "wasting time and fooling around."

11. Mr. Mitchell, the respondent's accounting manager related two separate incidents concerning the grievor. The first occurred around the end of March and concerned the unloading of a shipment of parts and tools which had just arrived from Japan. The essence of Mr. Mitchell's evidence appeared to be that the grievor accused Mr. Mitchell of throwing a clipboard at him and did not follow Mr. Mitchell's directions concerning the way in which the shipment should be unloaded. There was a further incident around April 25th, when the grievor threatened to ram his foot down Mr. Mitchell's throat.

12. Mr. Mitchell said that on April 17th he was preparing the payroll for the bank and, being aware that Messrs. Suzuki and Fujiwara were not satisfied with the grievor's performance, suggested that it would be a good time to discharge the grievor because the final pay cheque could be done. The evidence was that Mr. Suzuki responded that he would have to discuss the matter with Mr. Fujiwara before a final determination could be made. Mr. Suzuki and Mr. Fujiwara both testified that they discussed the matter and had decided to terminate the grievor when they received the notice of the complainant's application for certification on or about April 19th.

13. Upon receiving the notice, Mr. Suzuki, accompanied by Mr. Fujiwara went to see a lawyer. (The lawyer they consulted then was not the lawyer who represented them at these proceedings.) Both men testified that they were advised that nobody should be hired or fired until after the certification hearing. Mr. Mitchell also testified that he was told by someone from the lawyer's office that no one could be discharged during that period. They further testified that their lawyer was aware of a petition which Mr. Suzuki subsequently prepared and circulated for signing among some employees.

14. Mr. Suzuki admitted that he prepared and circulated among some employees a petition which was submitted to the Board in connection with the application for certification. Mr. Suzuki also admitted that he spoke to one employee, Pat Bailey, and told her that he did not know what would happen if the union's application succeeded and that possibly both he and Mr. Fujiwara would be recalled to Japan. He also said that it was possible that he may have told her that there was a possibility that the parent company in Japan might close down the operation.

15. Mr. Suzuki also admitted that on or about April 23rd he had a conversation with



the grievor, after the notice was posted. He said that the grievor approached him, asked what the “green sheet” was all about, and professed ignorance of the matter. Mr. Suzuki said that in the course of that conversation he asked the grievor whether he had signed a union card, and was told that he hadn’t.

16. On the same day Mr. Murphy said that he had a conversation with the grievor about the “green sheet”. Mr. Murphy said that the grievor asked him what the sheet was about and also professed ignorance of the matter. Mr. Murphy also said that the grievor asked his opinion of the application and, in response, he told the grievor that he was against the union. He said the grievor agreed with him and asked what he could do about it. Mr. Murphy suggested that the grievor write to the Board, as he had done, and the grievor said he would do so. At the time of that conversation Mr. Murphy expressed surprise at the grievor’s ignorance of the matter and told the grievor that he had thought the grievor was behind it because he had raised a fuss about the lack of a job description and had been threatening to go to the Labour Board to get the matter straightened out. During the course of that conversation the grievor told Mr. Murphy that he had signed a card but wanted to change his mind. The grievor subsequently sent a letter to the Board. The letter was given to Mr. Mitchell for delivery.

17. During the incident involving Mr. Mitchell on or about April 25th, the grievor, after threatening to ram his foot down Mr. Mitchell’s throat, said that he had written to the Board against the union but would withdraw his opposition if things continued as they were.

18. Both Messrs. Suzuki and Fujiwara testified that they did not know anything about any union activity on the part of the grievor when they decided to discharge him around April 19th. They also said that they saw the grievor at the certification hearing on May 7th sitting with the union representative and two other employees. At that time they said they concluded that the grievor was a union supporter. Mr. Suzuki said that before the hearing he was unsure about whether a probationary employee could join a union and, because of his confusion about the numbers of people the union claimed were in the bargaining unit, was not sure whether the grievor was in the unit.

19. The complainant was certified on May 14th and on that day Mr. Suzuki said that he was told by his lawyer that the grievor could now be discharged. The lawyer dictated the contents of the letter (Exhibit #1) to Mr. Suzuki, who typed it and gave it to the grievor on May 15th. Mr. Suzuki said that the only reasons for the discharge were poor work performance, customer complaints about shipping, salesmen’s complaints about shipments, and the grievor’s failure to take direction or supervision given by his supervisors.

20. The grievor testified on his own behalf. He is 22 years old and has been working since he was 16. In that period of time he has held four or five jobs. He said that when he was hired he was told that he would be on probation for the first three months but that the possibility of discharge for unsatisfactory performance was never mentioned.

21. The grievor admitted that he let down in the effort he put into his work after the first few weeks, but also said that he felt that he was doing his job well throughout the time he was employed. He specifically denied ever having been warned by Mr. Fujiwara that he would be discharged if his performance did not improve. He did however admit that Mr. Murphy had spoken to him four or five times about the quality of his shipping and had told him to be more careful next time.

22. The grievor admitted the altercations with Mr. Mitchell and also gave versions of the conversations with Messrs. Suzuki and Murphy after the green sheets were posted which coincided with the testimony of those two men. The grievor said that he feigned ignorance of the union so that no member of management would know of his involvement.

23. Regarding his union activities, the grievor testified that he and three other employees were having a discussion during which they were expressing their dissatisfaction with the respondent when they decided that they should start a union. The grievor said that he had had some experience with unions so he called the Labour Board to see which union would handle them and was put in touch with the U.A.W. He said he contacted the U.A.W. and joined that union, but when it was discovered that the U.A.W. could not organize them they were put in touch with the complainant. He said that he then joined the complainant.

24. The grievor testified that he approached one of the office employees about signing a card. He said he believed that this employee may have told Mr. Suzuki about his activities. The grievor testified that he was absolutely certain that his work performance had nothing to do with his discharge.

25. The Board accepts the evidence that the grievor's work performance was unsatisfactory. There appears to be no real reason to suggest that the respondent's witnesses should not be believed when they testified of sloppy and careless work and of the grievor's failure to take direction from supervisors. Moreover, it is clear that Mr. Murphy told the grievor to improve and, in view of the evidence about the grievor's performance, it is indeed probable that Mr. Fujiwara warned the grievor to improve or he would be let go.

26. In our view, the fact that the grievor was a probationary employee is largely irrelevant. In the absence of any sort of agreement, employees in Ontario do not enjoy the sort of job security which would make the difference between probationers and others important. What is relevant is that, regardless of what the grievor was told, it is clear that he was aware that as a new employee his performance was being evaluated and that it might prove to be unsatisfactory.

27. It is difficult to credit the grievor's story about contacting this Board and being sent to the U.A.W. as a consequence of that contact. The Board can surely take notice of its own practice in that regard and it is not the practice to refer anyone inquiring about union representation to any specific union. There is also no credible evidence that the grievor was a collector or particularly active in the organizing campaign and the complainant's other evidence did not in any way touch upon the grievor's activities in this regard. Moreover, in view of the grievor's statements to Mr. Suzuki and Mr. Murphy, and in view of the fact that the grievor did send a letter to the Board to the knowledge of the respondent, it would appear probable to conclude that the respondent was unaware of his sympathies until he was seen at the certification hearing. There were other employees present at the hearing and there is no evidence to suggest that any action was taken against them or against any other employee.

28. Set against this there was here a definite and admitted pattern of anti-union conduct by management in connection with the complainant's application for certification. It is clear that the respondent did not want the complainant to be certified and that Mr. Suzuki engaged in conduct which was intended to defeat the complainant's certification application.

29. This Board must decide whether the grievor's union activities in any way contributed to the decision to discharge him. A crucial matter to be decided in this connection is when the decision to discharge was actually made. There was evidence from Messrs. Suzuki, Fujiwara and Mitchell that the grievor's discharge was discussed on or about April 17th, decided upon before April 20th, and delayed on the advice of the respondent's lawyer. It is true that the lawyer did not testify, but the Board does not regard this as a reason for drawing an adverse inference, and it does not regard the situation as being the same as that in *Beaver Engineering Limited*, [1973] OLRB Rep. Jan 57. In view of the evidence it seems highly probable that the respondent was given such advice by its solicitor. Therefore, we accept as probable that the decision to discharge was made before the "green sheets" arrived but delayed on the advice of the respondent's lawyer.

30. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 the Board set out the basic proposition that the Act requires the employer to satisfy the Board that the more probable inference to be drawn from the facts was that the discharge was unrelated to union activity. In *DeVilbiss (Canada) Limited*, [1975] OLRB Rep. Sept. 678 the Board noted that it must be careful not to let anti-union activity "masquerade as just cause" (page 680) and then at page 681 isolated four factors which should be considered. They are:

- (1) The existence of a pattern of anti-union activity at or around the time of the discharge.
- (2) The extent of the employer's knowledge of the existence of union activity and of the employee's involvement in that activity.
- (3) The manner in which the employee was discharged.
- (4) The credibility of the witnesses.

Further along on page 681 at paragraph 12 the Board said:

"Knowledge by the employer of union activity and the employee's involvement in that activity is an important ingredient in determining the motive for a discharge. If an employer has no knowledge of union activity among its employees, which might occur in the early stages of an organizing drive, then the possibility of an anti-union motive would be remote. Conversely, if there is knowledge, and that knowledge manifests itself in an anti-union attitude, then there would be evidence upon which the Board could base an inference that the discharge was prompted by an anti-union animus. The inference would become even stronger if the discharged employee is extensively involved in union activity and this involvement is known by the employer."

31. In the case before this Board, there was without a doubt an "anti-union attitude" manifested by the respondent around the time of the certification application, and that "attitude" manifested itself in an attempt to try to thwart the certification application. There is therefore evidence upon which we could make an inference that the discharge was prompted by anti-union animus. However, that inference becomes extremely hard to make when the Board considers that the grievor was really no more extensively involved in union



activity than many other employees, that his position in relation to union activities was made all the more ambiguous by his apparent willingness to write a letter to the Board against the union, that the grievor had been employed for only two months, during which his performance since the end of March was the subject of criticism by the respondent, and that there was no action taken against any other employee whose participation was as great or greater than the grievor's. In conclusion, while there was an anti-union attitude on the part of the respondent, the more probable inference to draw here is that the grievor was discharged solely for reasons other than his union activity.

32. For all of the above reasons, the complaint is dismissed.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE:**

1. I dissent from the majority decision in this case. I am satisfied that the respondent has failed to discharge the burden of proving that the grievor was discharged only for reasons not related to union activity.

2. *The Barrier Examiner* [1975] OLRB Rep. Oct. 745 sets out the "burden of proof" on the respondent in Section 79 applications:

"... the appearance of a legitimate reason for discharge does not exonerate the employer if it can be established that there also existed an illegitimate reason for the employer conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

3. The majority decision in this case declared the "anti union animus" of the respondent in paragraph 31. "In the case before this Board, there was without a doubt an 'anti-union attitude' manifested by the respondent around the time of the certification application and that 'attitude' manifested itself in an attempt to try to thwart the certification application."

4. Mr. Fujiwara, the general manager, and Mr. Suzuki, the other senior official of the respondent, gave evidence that they discussed the matter and decided to terminate the grievor April 19th before they received the notice of the complainant's application for certification. They received the notice of application the same day, but upon visiting their lawyer, who was not the lawyer representing the employer at the hearing, they were advised not to discharge the grievor until after the certification hearing. The complainant was certified on May 14th. Mr. Suzuki gave evidence that he was told by his lawyer that the grievor could now be discharged. Mr. Suzuki claimed the lawyer dictated the contents of the letter (Exhibit #1) and he gave it to the grievor May 15th. The respondent, by not calling its lawyer, Mr. Margolis, to testify leaves a void in the respondent's case. It is a reasonable inference that the evidence of Mr. Margolis would not have supported the respondent's case.

5. From the testimony given by the grievor, Mr. Mettmann, I am satisfied that he was the main force behind the complainant's application for certification. He gave evidence that on April 7th he contacted the U.A.W. and was referred to the complainant union. On April 17th he met with Mr. B. Andrews a representative of the complainant and advised Mr. Andrews that he had spoken to 3 people favourable to the Union out of what he considered a bargaining unit of 5 people.

6. Even if the respondent is to be believed when it states that it was not aware of the grievor's union position until the certification hearing on May 7th, it then knew that he was a union member. Considering the established anti-union animus of the respondent, the respondent's motives for discharging the grievor on May 15, when it clearly knew that the grievor was a strong supporter of the union are suspect.

7. The respondent is aware that with the discharge of the grievor and the voluntary resignation on May 28th of one Pat Bailey, a witness for the complainant, this leaves the complainant in a very precarious position with two union members taken away from the bargaining unit of five. The concerted conduct by this type of employer in undermining the union creates a sham of the certification process which must be abated by the Board.

8. It is my decision that the respondent *has not* established on the balance of probabilities that it did not act contrary to the Act in discharging the grievor. It is my finding that the grievor should be reinstated with compensation to the grievor and the union.

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**0760-79-U Christopher M. Sojka, Complainant v. Massey-Ferguson Industries Limited and U.A.W. Local 439, Respondents.**

**Duty of Fair Representation – Employee quitting and seeking reinstatement 18 months later – Union refusing to process grievance – Disbelief of grievor and delay basis for refusal – No violation of section 60**

**BEFORE:** M. G. Picher, Vice-Chairman

**APPEARANCES:** *Christopher M. Sojka on his behalf; J. B. Rohrer and G. W. Fryah for Massey-Ferguson Industries Limited; Jim Porter for U.A.W., Local 439.*

**DECISION OF THE BOARD;** October 18, 1979

1. The name: "Massey-Ferguson Ltd." appearing in the style of cause of this application as one of the respondents is amended to read: "Massey-Ferguson Industries Limited".

2. The complainant, Christopher M. Sojka, submits that the respondent union, by its failure to carry his grievance against his employer, has breached its duty under section 60 of *The Labour Relations Act*.

3. Mr. Sojka was employed as a drill operator and as a press operator in the Toronto plant of Massey-Ferguson Industries Ltd. from May 1973 to June 1977. On March 11, 1977 he suffered a back injury in the course of his work which led to the end of his employment. He was away from work until June of that year, when he was found medically fit to perform light duties. There was no such work available. At the suggestion of the company's personnel officer, the complainant agreed to terminate his employment for medical reasons. On July 11, 1977 he signed a separation form to that effect.

4. The complainant submits that he was nevertheless entitled to separation pay, including an attendance bonus that the company has wrongfully withheld. Having now recovered the ability to work, subject to a 10% disability allowance for which he receives Workmen's Compensation, he maintains that the company has an obligation to resume his employment. He further submits that the company failed in its obligation under the collective agreement to pay its share of premiums for OHIP, a dental plan and a prescription and medical services plan during the period of his absence.

5. Mr. Sojka's dispute with the company is simple. It takes the position that he voluntarily quit and is therefore not entitled to severance pay, an attendance bonus or premium benefits and that the company has no obligation to put him back to work. The complainant argues that whatever he may have signed, he did not intend to quit, but merely to take a leave of absence for medical reasons, thus preserving his employment relationship. The respondent union has refused to process Mr. Sojka's claim through the grievance procedure and that has given rise to this complaint.

6. To succeed the complainant must satisfy the Board that the union's refusal to carry a grievance on his behalf was arbitrary, discriminatory or in bad faith. In this case allegations of discrimination and bad faith are neither made by the grievor nor supported by the evidence. Mr. Sojka's claim is that the union treated him arbitrarily.

7. The purpose of section 60 is not to impose upon a trade union an unrealistic standard of infallibility. The complainant will not succeed if the evidence discloses merely that the union's treatment of Mr. Sojka resulted from some error in judgment on its part or resulted from negligence not amounting to gross negligence. The wording of the section reflects a recognition of the limitations within which union representatives, who are often rank and file employees with limited training in industrial relations, work in the day to day representation of numerous employees. Section 60 was not intended as a ground to second guess a decision, taken by a union in good faith, without discrimination and after due consideration even if that decision is not the one which the Board, in the cold light of a hearing, would have made. (See *Prinesdomu* [1975] OLRB Rep. May 444; *Barber Coleman of Canada Ltd.* [1976] OLRB Rep. Oct. 613.)

8. In this case, the evidence establishes that the complainant did not seek advice from his union nor advise the union of his actions at the time that he signed his termination form. It was not until March of 1978 that he approached the union, asking its Vice President for help in securing his separation pay. Being unaware of the details of Mr. Sojka's case, the union officer assumed that since he was on Workmen's Compensation the complainant must, according to established practice, still be employed. He therefore advised him that any action would be premature so long as full compensation benefits continued, and that Mr. Sojka should again approach the union when those benefits ceased.



9. When his full compensation benefits ceased in February of 1979, the complainant again approached the union. Only then, some 18 months after the event, did the union learn that Mr. Sojka had signed a separation form. Two factors then influenced its decision not to file a grievance on his behalf. Firstly, the passage of time, including the company's reliance on the document signed by the complainant, greatly reduced the chances of success of any grievance on his behalf. Secondly, according to the union's unchallenged representations, having learned that the grievor had been laid off twice previously, in 1973 and in 1974, the union's officers did not accept that Mr. Sojka did not know what he was doing when he signed the separation form. To put it bluntly, they decided that his explanation was without merit.

10. The grievor is an articulate individual with a university master's degree. Even if the Board accepts the truth of his plea of "*non est factum*" and believes his explanation that he misunderstood the consequences of signing a separation form, it cannot find in the union's thorough consideration of his case and its ultimate refusal to accept his side of the story any breach of the union's duty under section 60 of the Act. The union's officers addressed their mind to the complainant's case as they were required to do. Their decision not to pursue it was based on their own best judgment of its merits and cannot be described as arbitrary, discriminatory or in bad faith. For the foregoing reasons the complaint is hereby dismissed.

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**0988-79-R Medi-Park Lodges Inc.** carrying on business as Grace Abbey Nursing Home, Applicant v. Service Employees Union, Local 204, Respondent.

**Termination – Union failing to send proposals within 60 days of notice to bargain – Employer seeking termination – Union consulting with employees and preparing proposals – No prejudice to employer or employees – Application dismissed**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** L. Bertuzzi and R. Stevenson for the applicant; H. Goldblatt, M. Elhadad and Tom Small for the respondent.

**DECISION OF THE BOARD;** October 29, 1979

1. This is an application under section 51 of *The Labour Relations Act* for a declaration that the respondent no longer represents the employees in a bargaining unit of service employees in the applicant's nursing home in Niagara Falls.

2. The facts are not in dispute. The respondent was certified as bargaining agent of the applicant's employees on June 13, 1979. On June 18, 1979 the union gave notice under

section 13 of the Act of its desire to bargain, advising the employer that its proposals for a collective agreement would be forwarded in the near future.

3. By letter dated August 27, 1979 the union's business agent sent the company its proposals in the form of a complete draft collective agreement. Some seventy days elapsed between the union notice to bargain and its commencement of bargaining by sending its proposals. On the same day that the union mailed its proposals to the employer this application was filed under section 51(2) of the Act. That section provides, in part:

"Where a trade union that has given notice under section 13 ... fails to commence to bargain within sixty days from the giving of the notice ... the Board may, upon the application of the employer ... with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit."

4. The employer submits that in this case, because the union submitted its proposals outside the time limit provided in section 51, the Board should declare that it no longer represents the employees or, in the alternative, conduct a representation vote to determine the wishes of the employees in that regard.

5. Certification gives a union an effective monopoly in the representation of a group of employees. Section 51 of the Act is therefore intended to insure that the rights of representation extended through a Board certificate are actively advanced by the union charged with that responsibility. While nothing in the Act can insure that the granting of bargaining rights will result in the consummation of a collective agreement, section 51 acts as a spur to require immediate and continuous efforts in bargaining on behalf of the employees concerned. A union that does not meet the minimum requirements of the section is liable, upon a successful application, to have its bargaining rights reviewed through the test of a representation vote, or to have them directly terminated.

6. The termination of bargaining rights under section 51 is within the discretion of the Board. The purpose of the section is not to punish a union but to protect employees and employers from the hardship that can result when bargaining rights are tied up by a union that fails to discharge its responsibilities. Thus section 51 should not be applied mechanically and without regard to its purpose to insure active union representation to all employees who are subject to collective bargaining. Even where the objective conditions of section 51 are met the Board may not terminate a union's bargaining rights or order a vote when, although the union has missed the deadlines within the section, it has in fact been active in advancing the interest of the employees concerned. (*Walmer Transport Co. Ltd.* 53 CLLC ¶17,062; *Dominion Stores Ltd.* 56 CLLC ¶18,047)

7. In this case it is clear that the union did not sleep on its rights. Rather than send the employer piecemeal proposals it decided on a slower and more painstaking process in order to submit the full text of a collective agreement as its proposal. This it did after consultation with the employees in the bargaining unit. On July 3, 1979 the union gave notice to the employees of a meeting to discuss the union's bargaining proposals. Since it was the applicant which posted the notice, the employer cannot claim to have been unaware of the meeting, which took place on July 16, 1979. The Board is satisfied that during the period in question the union was doing groundwork in preparation for bargaining and that the employer was aware of that.

8. One consideration in an application of this kind is whether there has been any prejudice to the employer because of the union's delay. It appears that during the time in question the employer was meeting with the respondent's business agents in negotiations on behalf of other employees of the applicant. At no time did it object to the union's delay in forwarding its proposals nor ask for any explanation for the delay. The employer did not then express to the union any detriment or prejudice to itself nor did it make any such complaint before us. Moreover there is no evidence in these proceedings of any employees objecting to the freeze on their terms and conditions of employment. On the facts before the Board there is no suggestion of any hardship to the employer or complaint by the employees as to the quality of representation they have had.

9. The union should, of course, have endeavoured to confer with the employees and put its proposals in a final form for presentation to the employer within the sixty day period stipulated in the Act. Its failure to do that is satisfactorily explained, however, by the staffing difficulties which it had at the time. A new business agent was introduced to the union's St. Catharines office during the course of the preparation of the union's proposal. That representative, Tom Small, became responsible for the negotiations, but required the assistance of Ms. M. Elhadad, a representative from the respondent's Toronto office. That fact, and the interruption of regularly scheduled summer vacations, caused some delay in the process of consultation with the employees and the final drafting of the union's proposal.

10. In these circumstances the Board is satisfied that the union's delay has been adequately explained. More importantly, we are satisfied that notwithstanding its delay the union has consistently endeavoured to advance the interests of the employees. In these circumstances the Board should exercise its discretion in favour of preserving the union's bargaining rights. The application is therefore dismissed.

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**1590-78-M** Bricklayers, Masons Independent Union of Canada, Local 1, Applicant v. **Metrus Contracting Limited** and Di Domizio Construction Limited and The Masonry Contractors' Association of Toronto Inc., Respondents v. Bricklayers, Masons & Tilesetters Union, Local No. 2 Ontario (affiliated with the International Union of Bricklayers and Allied Craftsmen), Intervener.

**Arbitration – Collective Agreement – Construction Industry – Related Employers – Section 112a – Father and son operating similar businesses – Whether related employers – Employer not bound by collective agreement merely by abiding by it**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and M. J. Fenwick.

**APPEARANCES:** *N. A. Endicott and John Meiorin for the applicant; D. I. Wakely for the respondent Di Domizio Construction Limited; Gary C. C. Walker for the respondent Metrus Contracting Limited; no one appearing for The Masonry Contractors' Association of Toronto Inc.; A. M. Minsky and John Zanussi for the intervener.*



**DECISION OF THE BOARD; October 1, 1979**

1. The applicant has referred to the Board a grievance concerning the interpretation, administration or alleged violation of a collective agreement for final and binding determination pursuant to section 112a of *The Labour Relations Act* and has applied to the Board for relief under section 1(4) of *The Labour Relations Act*.

2. The applicant requests that the Board grant the following relief:

- “(i) A declaration that the respondents, Metrus Contracting Limited and Di Domizio Construction Limited, constitute one employer for the purposes of the Act in accordance with section 1(4) thereof;
- (ii) A declaration that the respondent [sic] as one employer under the Act are bound by the collective agreements dated June 1, 1978, between The Masonry Contractors’ Association of Toronto Inc. on behalf of all its members and The Bricklayers, Masons Independent Union of Canada, Local 1, and;
- (iii) A direction that the respondents pay the sum of \$2,463.00 currently being held by The Masonry Contractors’ Association of Toronto Inc. and the check-offs and contributions owing under the collective agreements for the months of June, July, August, September and October of 1978.”

3. On June 13, 1973, the Board issued a certificate to the applicant with respect to Metrus Contracting Limited (“Metrus”). See Board File No. 3716-73-R. Metrus was incorporated on February 14, 1972. During the early years of its existence Metrus was owned by a variety of combinations of individuals, including Antonio Di Domizio (“Antonio”). However, since approximately March of 1976 Antonio has been the sole owner of Metrus. From the beginning of 1978 (and perhaps even earlier) Metrus has been in financial difficulties and in July of 1978 it reached the very edge of insolvency.

4. Antonio’s son, Paul Di Domizio (“Paul”) is a construction worker who worked intermittently for Metrus. It appears that he became concerned about the future of his father’s business. On January 26, 1978, Di Domizio Construction Limited (“Di Domizio”) was incorporated with Paul as the sole director.

5. Up until the time of its insolvency in July of 1978, Metrus was engaged in the construction industry as a masonry contractor. It had a place of business, a bookkeeper, a payroll and general duties clerk, construction equipment and a force of bricklayers and bricklayers’ assistants of between twenty and forty. During this time Elio Evangelista was employed by Metrus as a foreman and Paul worked from time to time on Metrus’ projects. Antonio directed the business of Metrus and neither Paul nor Mr. Evangelista had any proprietary interest in Metrus.

6. During 1978 Metrus experienced financial difficulties. In an effort to shore up Metrus, Antonio mortgaged his home and used the proceeds to continue in business with Me-

trus. As the financial position of Metrus deteriorated Antonio lost his home under a power of sale. Towards the end of July of 1978 Metrus was unable to meet its financial obligations as they fell due. As a result, the general contractors with whom Metrus was in contractual relations removed Metrus from its various projects and a finance company repossessed all of Metrus' equipment apart from a few scaffolds. In the words of the witness Otello Ongaro, Antonio pronounced himself destitute and went to live with Paul.

7. Towards the end of July or the beginning of August of 1978, Di Domizio endeavoured to finish some of the projects which Metrus had been unable to complete. Paul was successful in negotiating cash advances from general contractors and with the help of Antonio, who was acting as a general manager for Di Domizio, negotiated additional contracts for masonry work to be performed by Di Domizio. During this period Antonio was acting as general manager and had no proprietary interest in Di Domizio. From time to time Antonio also occupied other offices in Di Domizio and had signing authority on Di Domizio's bank account. However, Antonio was never a director of Di Domizio and he apparently became an employee of Di Domizio. Di Domizio succeeded in renting the construction equipment which it required to carry on business.

8. Di Domizio's masonry business was strengthened during October of 1978. Paul sold to Alex Di Matteo and to Elio Evangelista one third interests in Di Domizio. The cost of each one third interest was eleven thousand five hundred dollars. Paul, Mr. Matteo and Mr. Evangelista also signed for a line of credit of fifty thousand dollars. Mr. Matteo has a good reputation in the construction industry where he operates his own forming and masonry company. He used his talents and contacts in the construction industry to secure additional work for Di Domizio. Mr. Evangelista is well-known and trusted by the bricklayers and bricklayers' assistants who were employed by Di Domizio. In addition, Mr. Evangelista became a director of Di Domizio and Antonio was no longer an officer of Di Domizio.

9. It is the applicant's position that Metrus violated certain provisions of two collective agreements dated June 1, 1978, between itself and The Masonry Contractors' Association of Toronto, Inc. (the "Association"). During the month of July of 1978 the applicant became aware that the terms and conditions of its collective agreement were not being complied with. It was not until October 27, 1978 that the applicant formulated and communicated its grievance to various companies including Metrus. Some seven weeks later, on December 15, 1978, this application was filed.

10. In the *Walters Lithographic Company Limited* case, [1971] OLRB Rep. July 406, the Board set forth various criteria or indicia in making a determination whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and may therefore be treated as one employer. These criteria or indicia are: (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations.

11. With respect to the first criteria, it is clear that Di Domizio and Metrus had entirely different ownership or financial control. Paul had no ownership or financial control in Metrus and Antonio had no ownership or financial control in Di Domizio. On the question of common management it appears that Antonio was the effective management of Metrus.

While Paul initially relied on his father's experience, the effective management of Di Domizio was in the hands of Paul and Mr. Evangelista at the time this application was filed. Indeed, Mr. Evangelista testified that he wanted to help Paul but with his father's advice. There was never any interrelationship of the operations of Metrus and Di Domizio. In fact Metrus was no longer in business when Di Domizio commenced work on its project. The fact that Di Domizio hired the payroll and general duties clerk from Metrus, retained Metrus' office and telephone number and initially hired most of Metrus' bricklayers and bricklayers' assistants does not constitute either an interrelationship of operations or a representation to the public as a single integrated enterprise. There was no evidence before the Board that there was any centralized control of labour relations. On the basis of the evidence and representations before it, the Board is not prepared to find that Metrus and Di Domizio are or were carrying on associated or related activities or businesses under common direction or control within the meaning of section 1(4) of the Act.

12. In any event, even if the factual requirements of section 1(4) had been established before the Board, there is still a discretion in the Board whether to grant relief under section 1(4). In the instant application Di Domizio granted voluntary recognition to the intervener and signed a collective agreement with the intervener on October 31, 1978. At that time Di Domizio had been operating as a masonry contractor for three months. The Board notes that the collective agreement was signed some six weeks prior to the filing of this application. The Board has repeatedly stated that the provisions of section 1(4) should be applied where the situation is fresh. See, for example, the *Industrial Mine Installations Limited* case, 1033 [1972] OLRB Rep. Dec. 1029. And the *Harold R. Stark Limited* case, [1978] OLRB Rep. Oct. 945. The results of delay in filing an application may lead to the circumstances of this application where another trade union establishes bargaining rights.

13. There remains for consideration whether the applicant is entitled to recover from Metrus the sum of money referred to in paragraph two or other sums of money variously referred to throughout the hearing. The applicant's right to collect these amounts is clearly dependent upon provisions in collective agreements which are binding on itself and Metrus. There is no doubt that Metrus has followed over the years the provisions of a series of collective agreements between the applicant and the Association. There is equally no doubt that the Board issued a certificate to the applicant with respect to Metrus in 1973. These two facts, however, in themselves do not establish that Metrus is bound by the current collective agreements between the applicant and the Association. As the Board noted in the *Bechtel Canada Limited* case (Board File No. 0745-75-R, unreported decision dated September 3, 1975), employers in the construction industry may choose for various reasons to honour the terms of a collective agreement as a matter of grace and not because of any legal obligation. In the instant application there was no evidence before the Board that Metrus was a member of the Association during successive renewals of the collective agreements between the applicant and the intervener. There was no evidence before the Board with respect to the provisions and requirements of sections 43(1) and (2) of the Act. In this regard see the *Sovereign Construction Co. Ltd.* case, 60 CLLC ¶16,168. On the basis of the evidence before it, the Board is not prepared to find that Metrus was bound to the current collective agreements between the applicant and the Association. Accordingly, the applicant is not entitled to collect the sums of money referred to in this paragraph.

14. For the foregoing reasons this application is dismissed.



15 In the course of argument the applicant raised for the first time the applicability of section 55 of *The Labour Relations Act* to the relationship between Metrus and Di Domizio. The other parties to this proceeding vigorously protested this line of argument on the grounds that they were taken by surprise and prejudiced by this line of argument. The Board has not considered the representations of the applicant with respect to section 55 of the Act. Where section 55 is alleged in a proceeding before the Board, there is a procedure to be followed under the Board's Rules of Procedure including the giving of notice to the employees who are affected. Moreover, there is a duty and an entitlement on the part of the respondents to adduce evidence before the Board. With the exception of the applicant, none of the parties to this proceeding had an opportunity to address their minds to an argument under section 55 of the Act and it would have been most unfair for the Board to have entertained the applicant's argument with respect to section 55.

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**0981-79-R Employees of Nel-Gor Castle Nursing Home, Applicant v. Canadian Union of Public Employees, Respondent.**

**Practice and Procedure – Termination – Timelines – Termination application untimely under *The Hospital Labour Disputes Arbitration Act* except during open period of collective agreement**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members W. F. Rutherford and E. C. Went.

**APPEARANCES:** C. McLachlan and J. Hunter for the applicant and H. Browne for the respondent.

**DECISION OF THE BOARD;** October 2, 1979

1. The applicant has applied to the Labour Relations Board under section 49 of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the exclusive bargaining agent.

2. The respondent union raised a preliminary objection alleging that the application was untimely. The undisputed facts relevant to the timeliness of this application are as follows: the respondent union was certified on July 20, 1978. Notice to bargain was sent to the Nursing Home on July 25, 1978. Negotiation meetings were held on November 23rd and November 29th. On December 1, 1978 a conciliation officer was appointed. Meetings were held with the conciliation officer on January 25, 1979 and March 21, 1979. On April 2, 1979, the Minister advised the parties that the conciliation officer had been unable to effect a collective agreement. On April 25th the respondent applied for interest arbitration and a date for the arbitration hearing has been set for October 11, 1979.

3. Nel-Gor Castle Nursing Home falls within the definition of "hospital" under section 1(1)(aa) of *The Hospital Labour Disputes Arbitration Act*. The timeliness of this application must, therefore, be assessed by reference to section 9(1) of *The Hospital Labour Disputes Arbitration Act* which reads as follows:

“Notwithstanding section 53 of *The Labour Relations Act*, where a trade union that has been certified as bargaining agent for a bargaining unit of employees of a hospital has given to the employer of such employees notice under section 13 of the Act and the Minister has appointed a conciliation officer, an application for a declaration that the trade union no longer represents the employees in the bargaining unit determined in the certificate may be made only in accordance with subsection 2 of section 49 of *The Labour Relations Act*.

Sections 49(2) and 53(1) of *The Labour Relations Act* provide as follows:

“49(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause *a* or *b* that provides that it will continue to operate for any further term of successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

53(1) Subject to subsection 3, where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

- (a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator; or
- (b) thirty days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board; or

- (c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.”

4. In *Birchcliff Nursing Home*, [1975] OLRB Rep. April 384 the Board, in interpreting section 9(1) of *The Hospital Labour Disputes Arbitration Act*, indicated that the reference in section 49(2) of *The Labour Relations Act* to section 53 of that Act was without effect. Accordingly, when notice has been given under section 13 and a conciliation officer has been appointed, as in this case, an application for termination may only be brought in the open period of the collective agreement which is ultimately established between the parties, or, more particularly, during the time periods set out in section 49(2)(a), (b) and (c) of *The Labour Relations Act*.

5. Normally where a collective agreement has not been made within one year of certification and a conciliation officer has been appointed, an application for termination may be made after the completion of the conciliation process, that is, after the expiration of the time limits set out in section 53(1) of *The Labour Relations Act*. For institutions falling within the scope of *The Hospital Labour Disputes Arbitration Act*, however, such as Nel-Gor Castle Nursing Home, a unique scheme of collective bargaining applies which precludes the parties from resorting to the ultimate sanctions of a strike or a lock-out. In their place the Act substitutes a procedure of compulsory arbitration. If following the release of the award of the board of arbitration the parties fail to execute a document in the form of a collective agreement giving effect to the decision of the board of arbitration, then, by a procedure outlined in *The Hospital Labour Disputes Arbitration Act*, a collective agreement automatically comes into effect. The scheme of the Act, therefore, is designed to insure that the parties will have a collective agreement. If a termination application could interrupt the process which is designed to ultimately establish a collective agreement between the parties, the scheme and purpose of the Act would be frustrated.

6. In this case the conciliation process referred to in section 9(1) of *The Hospital Labour Disputes Arbitration Act* was set in motion on December 1, 1978. The parties do not yet have a collective agreement. The hearing before the board of arbitration is scheduled but has not yet taken place. In these circumstances the instant application is untimely because it may only be brought during the open period of the collective agreement that is ultimately established between the parties. Accordingly, the application is hereby dismissed.

7. For the purpose of clarity the Board draws the attention of the parties to certain provisions of section 7 of *The Hospital Labour Disputes Arbitration Act* which may, among other sections, become relevant in determining the timeliness of a termination application:

“(8) Except in arbitrations under section 5b, the date the board of arbitration gives its decision is the effective date of the document that constitutes a collective agreement between the parties.

(10) Except where the parties agree to a longer term of operation, any document that constitutes a collective agreement between the parties



shall remain in force for a period of one year from the effective date of the document.

(11) Notwithstanding the provisions of subsection 10 and except where the parties agree to a longer term of operation, a document that constitutes a collective agreement shall cease to operate on the expiry of a period of two years,

- (a) from the day upon which notice was given under section 13 of *The Labour Relations Act*; or
- (b) from the day upon which the previous collective agreement ceased to operate where notice was given under section 45 of *The Labour Relations Act*.

(12) Where under subsection 11, the period of two years has expired on or will expire within a period of less than ninety days from the date the board of arbitration gives its decision, the document that constitutes a collective agreement shall continue to operate for a period of ninety days from the date the board of arbitration gives its decision for the purposes of subsection 4 of section 5, subsection 1 of section 45 and subsection 2 of section 49 of *The Labour Relations Act*.

(13) In making its decision upon matters in dispute between the parties, the board of arbitration may provide,

- (a) where notice was given under section 13 of *The Labour Relations Act*, that any of the terms of the agreement except its term of operation shall be retroactive to such day as the board may fix, but not earlier than the day upon which such notice was given; or
  - (b) where notice was given under section 45 of *The Labour Relations Act*, that any of the terms of the agreement except its term of operation shall be retroactive to such day as the board may fix, but not earlier than the day upon which the previous agreement ceased to operate.”
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**1285-79-R** Laborers' International Union of North America Local 247,  
Applicant, v. **Newman Bros. Limited**, Respondent.

**Bargaining Unit – Construction Industry – Union seeking certification in two Board areas –  
Employees working in one Board area – Certificate restricted to single Board areas**

**BEFORE.** N. B. Satterfield, Vice-Chairman and Board Members W. Gibson and C. Ballentine.

**DECISION OF THE BOARD;** October 17, 1979

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5. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

6. The applicant is seeking certification for a unit embracing two Board Areas, #12 and #29. The respondent's employees who are affected by this application were employed on the application date in Board Area #12 only. Therefore, the Board, in exercising its authority under section 108(1) of the Act to determine the appropriate unit by reference to a geographic area, will determine the unit in this application by reference to Board Area #12. The Board wishes also to point out that its general practice in exercising its authority under section 108(1), is not to describe an appropriate unit in terms of more than one board area even if the applicant has membership support adequate for certification or for a representation vote in more than one board area. Its general practice is to certify or direct a representation vote, depending upon the membership evidence, in each geographic area.

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9. A certificate will issue to the applicant.

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**1040-79-R** Labourers' International Union of North America, Local 506,  
Applicant, v. **Newman Bros. Co. Limited**, Respondent.

**Bargaining Unit – Construction Industry – Practice and Procedure – Applicant's territorial jurisdiction differing from Board's geographic areas – Seeking bargaining unit to conform with its jurisdiction – Board not departing from established practice**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**DECISION OF THE BOARD;** October 16, 1979

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5. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

6. The employees affected by this application are all employed on a project in the City of Barrie in the County of Simcoe. The applicant is seeking to be certified for a unit consisting of all construction labourers in the employ of the respondent in the Board's geographic area #18, that is the County of Simcoe and the District Municipality of Muskoka. The respondent contends that the unit should be restricted to the County of Simcoe and in this regard relies on an arrangement under which the applicant is to have jurisdiction over the greater part of the County of Simcoe (including Barrie) while its sister local 597 based in Oshawa is to have jurisdiction over the District Municipality of Muskoka and a portion of the County of Simcoe.

7. Following the enactment in 1962 of the construction industry provisions of the Act which prohibited project certification, the Board established a number of standard geographic areas by reference to which it describes bargaining units in the construction industry. Although both the territorial jurisdictions claimed by the various union locals as well as the geographic scope of collective agreements they had entered into were considered when the Board areas were established, it is not at all unusual for the territorial jurisdiction of a particular local not to coincide with the boundaries of a Board area. In large measure this is due to the fact that there is no uniformity in the territorial jurisdictions of the locals of the different construction unions. In the first few years following the establishment of the Board areas, a number of requests were made to have the Board depart from its standard areas and define a bargaining unit in the same terms as the geographic scope of collective agreements to which the applicant local was signatory. The Board's response to such requests is typified by the following excerpt from *Anglin-Norcross Ontario Limited*, [1964] OLRB Rep. Dec. 401. The first two paragraphs are a quotation from the Board's earlier decision in *Cedarhurst Paving Co. Limited* (File No. 9582-64-R):

“ ‘If the Board were to adopt the respondent's proposed area in the present case, it would be extremely difficult for the Board to refuse to recognize area patterns established in other branches of the construction industry which do not conform to the established area. Yet it is clear that a number of different areas do prevail as for example in the collective agreements which the Electrical Workers, the Plumbers, the Marble Masons, the Millwrights, the Sheet Metal Workers and the Iron Workers have with various employers and employers' associations. Moreover, many of these areas do not coincide one with the other. Consequently, to accept the respondent's submission in this case would lead inevitably to the establishment by the Board of at least eight separate areas centering on Toronto. In this connection, it should be noted that the Board has refused the request of the Electrical Workers to depart from the established Toronto area despite a pattern of bargaining to the contrary.

It is also of interest to note that in a recent case before the Board the Plumbers requested and obtained the regular area although this differs from the area in their agreement with the Toronto Labour Bureau.’



The same considerations apply to the present case. If the Board were to accede to the applicant's request, it would be virtually impossible for it to refuse similar requests from other unions whose collective agreements with employers and employers' associations are effective over differing areas. While it may be that a case could be made out for establishing an area separate and apart from the regular Toronto area, we can see no justification for establishing seven and perhaps more such areas."

8. In our view, the considerations referred to in the *Anglin-Norcross* case still apply. For the Board to accede to requests that it describe bargaining units on the basis of the claimed geographic jurisdiction of each union local would potentially result in the establishment of a distinct province-wide pattern of bargaining units for each construction union. Further, each of the resulting patterns would be subject to change whenever the territorial jurisdiction of a local was altered, or two or more locals merged together. An unfortunate result of this might well be to prolong construction certification proceedings due to disagreements concerning the geographic scope of the bargaining unit.

9. Although we are of the view that the Board should not depart from its practice of describing bargaining units by reference to its standard Board areas, we do recognize that changing circumstances may require changes to the boundaries of the Board areas. Before making such changes, however, (apart from primarily "housekeeping" changes resulting from alterations in political boundaries and municipal name changes) the Board's practice is to give all interested trade unions and employer organizations an opportunity to make submissions on the matter. Examples where such a procedure has led to changes in Board areas include *City Concrete Forming Ltd.*, [1967] OLRB Rep. Dec. 830, *Lido Plastering Co. Ltd.*, [1968] OLRB Rep. May 180, and *John McLeod and Sons Limited*, [1970] OLRB Rep. July 462. The respondent in these proceedings has not suggested that the Board should amend its geographic area #18.

10. Having regard to the above, we are satisfied that the bargaining unit in the instant application should be described in terms of the Board's standard area #18. Accordingly, the Board finds that all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining. • • •

12. A certificate will issue to the applicant.

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**0451-79-M** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 67, Applicants, v. the Mechanical Contractors Association of Ontario and **Sheafer-Townsend Construction Limited**, Respondents.

**Arbitration – Construction Industry – Whether steward appointed based upon number of employees at project – Definition of “job” – Definition of “permanently”**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *Stanley Simpson and Trevor Byrne for the applicants; D. L. Brisbin, F. C. Whyte, R. McDade and G. Opacic for the respondents.*

**DECISION OF THE BOARD;** October 31, 1979

1. This is a referral of a grievance to arbitration pursuant to the provisions of section 112a of the Act.
2. The applicants and the respondents are bound by the terms of a collective agreement operative from the 15th day of June, 1978 to the 30th day of April, 1980.
3. The grievance is with reference to “Termination of Local Union 67 Job Steward for Sheafer & Townsend Ltd. – Dofasco Bay Front”
4. The text of the grievance states, in part, “Local 67 do hereby grieve the termination of the union’s Job Steward Mr. D. Gemmell from the abovenoted job site by the Sheafer & Townsend Company in violation of the Collective Agreement, Article 39 Stewards”.
5. It is common ground that the Article in question is Article 23 of Appendix 9 to the collective agreement. That Article reads as follows:

“.1 On a job where there are five (5) or more men working, a Job Steward shall be appointed by the Local Business Agent or may be elected by Local 67 members on the job site, such election shall not interfere with the progress of the work. He must be on the job at all times while the work is in progress, and may have the privilege of consulting the foreman about safety or any difficulties that may arise. He shall have seniority on the job until the work force is reduced to five (5) men permanently. The Union shall notify the Employer by mail when a Job Steward is appointed or elected, and the Employer shall notify the Union by mail when a Job Steward is to be laid off. Job Stewards shall receive reasonable notice of lay-off and transfer of personnel.”

6. The remedy sought by the union is “reinstatement of the union’s Job Steward at the company’s Dofasco job site from which he was terminated, together with reimbursement for the time lost”.

7. The question before the Board involves the interpretation of the word “job” as it is used in section 23.1 of the collective agreement. A further question involved in the grievance is that of the meaning to be attached to the word “permanently”.

8. The views taken by the parties as to the proper interpretation of the words in dispute become clear upon an examination of the work operation out of which the present grievance arose.

9. The Dofasco Bay Front area is a very large tract of land upon which Dominion Foundries and Steel Ltd. (Dofasco) carries on operations. For some 25 years Sheaffer-Townsend has had employees working in the Dofasco Bay Front area on construction and reconstruction of various shops and facilities of Dofasco, together with maintenance and repair work on these shops and facilities. The Sheaffer-Townsend work force has fluctuated over that period from a high of over 200 to a low of 4 employees.

10. During the course of the evidence, reference was made to work being done at different locations throughout the Dofasco Bay Front area by members of Local 67. These were the Pump House, the Sludge Plant, the Coke Plants, By-Products, the High Line, the Oxygen Line and others.

11. It was the contention of the company that work being done at and on any of the above constituted a “job” within the meaning of section 23.1.

12. The union, on the other hand, contends that the word “job” in the collective agreement comprises, in the present case, all the activities of the company being carried out for Dofasco within the limits of the Dofasco Bay Front area viewed as one and that the specific operations are merely facets of that one job.

13. In support of its contention the company referred to the Oxford Universal Dictionary’s definition of “job” as: “A piece of work; a small definite piece of work in one’s own calling”; and to Webster’s: “A piece of work; a small miscellaneous piece of work”. The union relied upon the Concise Oxford Dictionary’s definition of “job” as: “Employment – something one has to do for hire or profit”. None of the definitions are particularly helpful in the context of an umbrella-like undertaking of construction and maintenance covering a number of small components related in terms of the skills and trade involved. There is likewise not much assistance to be had from the terminology used by the persons concerned. The grievor used the term “job” interchangeably to mean the whole undertaking at one time and the specific components at other times.

14. In the present context if one were to accept the position held by the company that there are a number of “jobs” going on at the same time in the overall area, the situation might very well arise where there were a considerable number of members of Local 67 in a work area such as the Dofasco Bay Front area but because they worked in groups of less than five, would not be entitled to a steward notwithstanding the total number of members working in close proximity. It would also lead to a situation where there could be one stew-



ard among a crew of five members where twenty or any number more members working in smaller crews would be entitled to no steward. Again, there might be a situation where the members total 200 working under the same employer on a maintenance or construction project but where the steward entitlement would reach 40. On the other hand, the interpretation urged by the union leads to no such absurdities but brings about a more reasonable and practical conclusion.

15. Evidence was advanced indicating that with respect to two installations, there was a separate steward. We are satisfied, however, that one of these incidents involved work outside the Bay Front area and the other concerned the movement into the area of a complete work crew with its own existing steward.

16. If the matter be viewed for the point of view that the language contains ambiguity, one may consider the evidence of past practice. The evidence, in this regard, was confined almost entirely to the situation at the Dofasco Bay Front area operation. The evidence is that for the past 25 years and even when the membership rose to 200 in that area, only one steward was appointed under a succession of agreements. The company's answer was that that was a default of the union in the exercise of its entitlement. That argument is, however, blunted by the fact that when the steward, Gemmell, attempted to have another steward appointed, he was met with strong opposition by the company and after a discussion between the union and the company, the latter's position was maintained.

17. It is our view that the word "job" as employed in section 23.1 of the collective agreement means, in the present context, the whole of the operations of Sheaffer-Townsend in the Dofasco Bay Front area and that it must be given a similar interpretation in similar situations where five or more members are employed.

18. As to the meaning to be attached to the word "permanently", we find that in the context of the nature of the work in which the parties to the agreement are normally engaged, "permanently" means that the steward retains his special seniority when, at the time of any layoff or reduction in forces, a recall is contemplated which will restore the number of members employed to five or more. At the same time the word "permanently" means that the steward's special seniority is lost if, at the time of the layoff, there exist reasonable and probable grounds for believing that the work force will not be increased so as to comprise five or more persons.

19. In the result then we find that the company has violated the provisions of section 23.1 of the collective agreement when it laid off Job Steward D. Gemmell, that he is consequently entitled to reinstatement and compensation for wages lost, and the Board so orders.

20. The matter of compensation is, at their request, left to the parties; but the Board retains jurisdiction in that regard in the event agreement cannot be reached.

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**0982-79-R** Patricia Barta and Lenka Mayer, Applicants, v. Retail Clerks Union, Local 206, Chartered by United Food & Commercial Workers International Union, Respondent, v. **St. Michael's Shops of Canada Limited** (operating as Marks & Spencer), Intervener.

**Parties – Practice and Procedure – Termination – Collective agreement describing two units – Termination application filed by full-time employees – Petition supporting application signed by both full and part-time employees – Whether application made in respect of one or both units – Whether signatories to petition are parties to termination application**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *Walter R. Stevenson for the applicants, Ted Wohl and Mary Armstrong for the respondent, R. J. Drmaj and Lorna Karn for the intervener.*

**DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD AND BOARD MEMBER J. D. BELL;** October 15, 1979

• • •

2. In this application under section 49(2) of *The Labour Relations Act*, the applicants, who are employees of the intervener employer, are seeking a declaration that the respondent trade union no longer represents the employees of the intervener in its retail stores in Oshawa, Ontario.

3. In Paragraph 3 of the application, which asks for the “Detailed description and geographic location of the unit of employees for which the respondent is the bargaining agent, including the municipality or other geographic area affected:”, the applicants stated:

“All employees of St. Michael's Shops of Canada Limited (Operating as Marks & Spencer) working at its retail stores in Oshawa, save and except supervisors, persons above the rank of supervisor and office staff.”

The *prima facie* evidence of support for the application was in the form of a petition. That document contains the signatures of all employees of the respondent in the above-described unit as of the making of the application. The signatures appear under the following heading on the petition:

“We, the undersigned employees of St. Michael's Shops of Canada Limited (Operating as Marks & Spencer) and each of us state that we no longer wish to be represented by Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Association and desire that the right of that union to bargain on our behalf be terminated.”

4. The respondent and intervener were parties to a collective agreement which expired August 31, 1979. There is an addendum attached to it which purports to cover part-time employees. The reply filed by the respondent describes two units, one in the style typical of a unit of full-time employees and the other in the style typical of a unit of part-time em-

ployees. The reply, in addition, alleges that the application is improper in respect of the part-time unit because the applicants are employees in the full-time unit.

5. At the hearing, the respondent elaborated its position and told the Board that it should find either that the collective agreement and its addendum constitute one document which is a collective agreement describing two distinct bargaining units, or two documents, each being a collective agreement and each describing a bargaining unit. Either way, the respondent submits, the Board should find that there are two units of employees. The respondent contends further that section 49(2) of the Act requires that the application be made by an employee in the bargaining unit defined in the collective agreement and the applicants named in the style of cause of the application are not employees in the part-time unit and therefore not eligible to apply on behalf of the part-time employees. Section 49(2) reads in part as follows:

“Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit . . . .”

6. Having regard to the submissions of the parties and having examined the collective agreement document, the Board is satisfied that the addendum to the agreement is in a form such that it has no life of its own separate from the agreement. Therefore, the Board finds that there is one collective agreement which includes the addendum between the respondent and the intervener. Clause 2.01 of the agreement and clause A.01 of the addendum read respectively as follows:

“2.01 The Company recognizes the Union as the exclusive bargaining agent for all its employees working at its retail stores in Oshawa, save and except supervisors and persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods.

A.01 The Company recognizes the Union as the exclusive bargaining agent for all its employees employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods working at or out of its retail stores in Oshawa, Ontario, save and except supervisors and persons above the rank of supervisor, office and sales employees.”

Having regard to these definitions and to all of the references in the collective agreement and its addendum to full-time and part-time employees, the Board finds that the parties have established two separate and distinct bargaining units of employees of the intervener at its retail stores in Oshawa: a unit of full-time employees (bargaining unit #1) and a unit of part-time employees (bargaining unit #2).

7. The wording of section 49(2) leaves no doubt that any employee in a bargaining unit defined in a collective agreement may apply for a declaration that the trade union which is a party to that agreement no longer represents the employees in that unit. The question is,



did any employee within the part-time bargaining unit make application for a declaration terminating the respondent's bargaining rights in respect of that unit as required by section 49(2)?

8. The respondent, in support of its position, cited the Board's decision in *William Scott v. International Union of Doll & Toy Workers of the U.S.A. and Canada, Local 905*, [1977] OLRB Rep. Aug. 534 (paragraph #5). In that case the applicant who was seeking a declaration terminating the respondent trade union's bargaining rights was an employee in the bargaining unit affected by the application. The collective agreement in which the unit was defined was one of two identical agreements between the trade union and the employer which resulted from common negotiations. The employer asked the Board to apply the application to the second bargaining unit as well. The Board, having regard to the provisions of section 49(2), (3) and (4), declined to expand the application stating, "... it is incumbent on the Board to concern itself only with the bargaining unit defined in the relevant collective agreement.". That case is readily distinguishable on its facts from the instant one, therefore is of little assistance to the Board in this matter. In another decision of the Board in *Clive R. Dyker v. Retail Clerks International Association Local 205*, [1971] OLRB Rep. Aug. 475, the Board dismissed an application for a declaration terminating bargaining rights under section 43, the predecessor of section 49, that was made in respect of a unit of part-time employees of the employer by an employee in the full-time unit. In that case the application had to do with a bargaining unit of part-time employees and was supported by a statement of desire which stated "we the undersigned part-time employees of. ...". That case does support the proposition that the person(s) named in the style of cause must be from the bargaining unit affected in order to constitute a proper application under section 49(2).

9. The Board has taken a far less technical approach, however, in two other cases: *R. Forget and a Group of Employees and Retail Clerks Union, Local 486 and Dominion Stores Limited*, Board File No. 18379-70-R, which is referred to in paragraph 6 of *Dyker v. Retail Clerks, supra*; and *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434. In the former decision (*Forget*), the application's style of cause showed the applicant as "R. Forget and a Group of Employees". Forget was an employee in the employer's full-time unit and the unit affected by the application was a unit of the employer's part-time employees. The Board took note of that circumstance and stated "In our opinion, whatever may be said of Forget's status as an applicant, the employees who identify themselves as such on the statement accompanying the formal application are *prima facie* entitled to bring the application. ...". In *Selinger* the Board was confronted with the situation where the employee named as the applicant in the style of cause of the application advised the Board at the hearing that he was withdrawing the application. The Board proceeded to hear and determine the application when two employees who were signatories to the document and present at the hearing made it known that they wished the Board to proceed with the application. While the facts in both of these decisions are different from the application at hand, the Board in each case was faced with a problem relating to the identification of the applicant in the style of cause of the application. In each case the Board went beyond the form of the application to examine its substance. In so doing it was not ignoring the statutory provisions governing the making of such applications, but rather was determining on the facts before it who were the true applicants and whether they were the proper ones within the statutory provisions.

10. The respondent trade union represents both the full-time and part-time employees of the intervener employer and the terms and conditions of employment for each of the

two categories of employees is contained in the single collective agreement. In the application before us, the unit defined is the sum of the two bargaining units defined in that collective agreement so there can be no doubt that the application was filed to cover both units. The schedules filed by the intervener identify employees as either full-time or part-time, so the Board is able to identify the employees' names on the petition with each of the two units. Thus the application when taken together with the statement, and having regard to the heading note on the petition, establishes that the employees of both bargaining units defined in the collective agreement between the respondent and the intervener are applying for a declaration that the respondent no longer represents them as their bargaining agent. Having regard to these circumstances, we are satisfied in this case that an application within the meaning of section 49(2) has been made by employees in the part-time unit. It remains, then, to decide if the statement of desire in support of the application contains the requisite number of signatures and if it is a voluntary expression of the wishes of those who signed it.

11. The two employees named in the style of cause of the application testified as to the origin and circulation of the petition. On the evidence before the Board we are satisfied that not less than forty-five per cent of the employees of the intervener in each of bargaining unit #1 and bargaining unit #2 have voluntarily signified in writing that they no longer wish to be represented by the respondent union on September 6, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

12. Accordingly, pursuant to section 49(3) of the Act, the Board directs that a representation vote be taken in each of bargaining unit #1 and bargaining unit #2. Those eligible to vote in bargaining unit #1 are all employees working at the intervener's retail stores in Oshawa, save and except supervisors and persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken. Those eligible to vote in bargaining unit #2 are all employees employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods working at or out of the intervener's retail stores in Oshawa, Ontario, save and except supervisors and persons above the rank of supervisor, office and sales employees on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters in each bargaining unit will be asked to indicate whether they wish to be represented by the respondent in their employment relations with the intervener.

14. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER O. HODGES:**

1. I concur in the ordering of a vote in bargaining unit #1.
2. I dissent from the decision to order a vote in bargaining unit #2.

3. The applicants Barta and Mayer are employees in bargaining unit #1. There is no applicant employee from bargaining unit #2. The petition containing names of employees of units 1 and 2, cannot be seen as being the application.

4. Section 49(2) is explicit:

“Any of the employees *in the bargaining unit* defined in a collective agreement may, . . . apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.”  
[emphasis added]

The panel is unanimous in finding two bargaining units in the collective agreement. The Board exceeds its jurisdiction by ordering a vote in bargaining unit #2, and I so find.

**0831-79-U** Labourers’ International Union of North America, Local 183,  
Complainant, v. **Tillotson-Sekisui Plastics Limited**, Respondent.

**Discharge for Union Activity – Section 79 – Lay-off date critical to certification application – Anti-union motive behind advancing lay-off date – Actual lay-off not violating Act – Compensation for work lost between actual and original lay-off dates**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. D. Bell and O. Hodges.

**APPEARANCES:** *A. M. Minsky and B. Fishbein for the complainant; Corinne Murray and Harold Aylesworth for the respondent.*

**DECISION OF THE BOARD;** October 19, 1979

1. This is a complaint filed under section 79 of the Act alleging violations of sections 56, 58(a) and (c), 61, 63(2) and 66 of *The Labour Relations Act*. The complaint is in respect of the company’s lay-off of twenty-three employees on July 30, 1979. The complainant alleges that the respondent company improperly and unlawfully discharged these employees or alternatively, locked out these employees contrary to the Act. The complainant alleges also that by intimidation, coercion, dismissal and threat of dismissal, the respondent compelled its employees to refrain from becoming or ceasing to be members of the complainant and interfered with the representation of its employees by the complainant.

2. The respondent company is a manufacturer of plastic moulding and other trim for doors, windows etc. with offices and plant located in Newmarket, Ontario. The complainant union filed application to be certified as bargaining agent for the company’s production employees on July 23, 1979. The company received notice from the Board of this application on July 26, 1979 although Mr. D. Ricci, production supervisor, testified that he was aware from before July 16, 1979 that the union was organizing and informed Mr. D Hartman, production manager, of the fact on July 16, 1979. The company terminated the employment of 23



of its 33 bargaining unit employees at approximately 11:30 a.m. on Monday, July 30, 1979. Those who were at work at the time were told by Mr. Ricci to stop work and depart the premises. Those who were not at work were contacted by telephone and told not to report for work. Those who were entitled under *The Employment Standards Act* received payment in lieu of notice.

3. The union maintains that the mass terminations were in response to and designed to thwart its application for certification. The company, on the other hand, argues that the mass terminations were precipitated by the severe financial difficulties encountered by it and were unrelated to the union's organizing.

4. The evidence establishes that on April 30, 1978 Sekisui Plastics of Tokyo acquired a 50 per cent interest in Tillotson Plastics Limited. Mr. Harold Aylesworth, the Vice President of Finance from July 27, 1979 and secretary of the company in April, 1978, testified that the company was insolvent and would have gone into bankruptcy in April of 1978 if Sekisui had not come forward to purchase a 50 per cent equity holding and make a sizeable loan to the company. There was no change in management at the time. The Japanese infused a further 1/2 million dollars in June and July, 1978 but by November of that year the company was insolvent once again. In February, 1979 the Japanese made an additional loan of \$800,000 to be used for "designated purposes." Notwithstanding the equity capital and loans received from Sekisui, the company showed a loss of one million dollars for the fiscal year ending April 30, 1979 and has continued to lose \$100,000 per month since that time. The financial statements of the company were put in evidence and the complainant union was given the opportunity to cross-examine as to their accuracy and meaning.

5. The company's difficulties can be traced to its attempt to develop a "wrap" product which its former president, Mr. Ron Tillotson, believed would catapult the company from a 15 per cent to a 66 per cent share of the market. Mr. Aylesworth testified that Mr. Tillotson was "super optimistic" with respect to the wrap program in spite of the technical difficulties which the company was experiencing in bringing the product to market. He testified that at the urging of Mr. Tillotson the company hired employees on two occasions in the expectation that it would be producing a wrapped product only to discover that it could not overcome its technical difficulties with the product. Similarly, we heard evidence that the 20,000 square feet addition to the company's plant (doubling its size) which began in May of this year and was recently completed was to facilitate production of the wrapped product. Throughout the relevant period the Company was employing 12 persons on the "wrap program" without ever producing a wrap product for sale.

6. Sekisui, as a 50 per cent owner of the company, sent two of its managers to investigate the financial difficulties of Tillotson-Sekisui in July. Messrs Masaki Maruyama and Hiroshi Shimomura arrived in Toronto on July 10, 1979 and set about reviewing the company's operations. Almost immediately they recommended that the "wrap program" be dropped but were met by strong resistance from Mr. Tillotson, the President. Mr. Tillotson refused to drop the program pending the arrival of Mr. Tadatki Noda who was being sent by Sekisui to make decisions with respect to the future of Tillotson-Sekisui. He arrived on Friday, July 20, 1979. The evidence establishes that a series of proposed budgets were prepared by Mr. Aylesworth and his colleagues for the Japanese with the final effort an operating plan which required only 10 production employees. The Japanese announced on Thursday July 26th that Mr. Tillotson had resigned as President of the Company and on the morning of Friday,

July 27th reached an agreement with the Bank of Montreal whereby the Bank agreed not to put the company in receivership at that time. A Board of Directors meeting was called following the meeting with the Bank and Mr. Masaki Maruyana was elected President. The Board of Directors adopted an operating plan whereby the company abandoned the "wrap program" and moved from a 4 shift – 7 day operation to a 3 shift – 5 day operation. There were 12 employees working on the "wrap program" at the time and 9 employees working per shift. Mr. Aylesworth testified that he advised the Board of Directors on Friday, July 27th of the union's application for certification. It is his evidence that the matter was left in the hands of Mr. Rubin, a Toronto lawyer on the Board of Directors who was made secretary of the company the next day.

7. Mr. Aylesworth testified that the implementation of the operating plan approved by the Board of Directors on Friday, July 27th necessitated the layoff of 23 production employees. He admitted in cross-examination that it had been contemplated that the layoff would occur on Friday, August 3rd but that when the Friday, July 27th meeting ended a decision had been made to lay off the following Monday, July 30th. He answered in cross-examination that he didn't know why the date of the layoff had been moved forward. No one came forward to testify as to the reason the layoff date was changed from Friday, August 3rd to Monday, July 30th.

8. A letter dated Friday, July 27, 1979 over the signature of Mr. Aylesworth was in the time card slot of each employee on Monday, July 30th. The letter reads:

"TO: The Employees,  
of Tillotson-Sekisui Plastics Limited

Our company experienced staggering losses during the past fifteen months and is now essentially insolvent. For the year ended April 30, 1979 our operating loss before income taxes was \$1,013,819.

On July 26, 1979 Ron Tillotson resigned as President and Director and Sekisui Plastics Company Limited took over his shares to become the sole shareholder.

Mr. Masaki Muruyana has been elected President and Chief Executive Officer. He is a capable and senior Executive of Sekisui, Japan.

Sekisui has been planning a corporate re-organization for several weeks in an attempt to save the company from bankruptcy. Such a plan, which is the only hope for the company's survival, was implemented by the Board of Directors on July 27 and some of the highlights are as follows:

- Reduced salaries for executives
- Abandonment of the wrap programme
- A re-organization of the production department
- Increase of marketing sales

– Efforts to improve quality control

Continued support of our company will be decided by Sekisui, Japan before September 15 at which time the future of the company will be determined. In order to favourably influence that decision and encourage Sekisui's financial and managerial support, you are urged to co-operate during this difficult period and contribute towards the new operating plan."

My Aylesworth testified that the letter, although drafted on Saturday July 28th, refers to decisions taken on Friday, July 27th. When asked in cross-examination why the letter was placed in the time slot of every employee when many were to be laid off he replied that although he knew that 23 employees were about to be laid off he did not know who they were going to be.

9. On Monday, July 30th, the production supervisor was advised by Mr. Hartman, the production manager, of the decisions taken by the Board of Directors the previous Friday. He was asked to lay off the employees who would no longer be required by the company. He testified that he was not familiar with individual employees so he called in the foremen, who were also advised by Mr. Hartman of the decisions taken by the Board of Directors, and asked them to help prepare a list of employees who should stay. He testified that he told the foremen that those employees who were best for the company in terms of experience and ability to train on machines in the future should be retained. He specifically mentioned that two employees who had P.V.C. experience from the Weston plant should stay. He admitted that when the final choice had to be made between two employees he suggested that if one was talking pro union he should go. As it turned out the final choice was made on the basis of reasons other than trade union activity. The employees were then called in and advised of the layoffs. Those not at work were notified by telephone. Both Mr. Aylesworth and Mr. Ricci testified that in their experience a company was advised to pay the notice rather than to allow employees to remain at work during the notice period and risk poor work or perhaps sabotage.

10. The company has continued to operate since July 30, 1979 with the same number of employees who were retained following the layoffs. Two of those who were laid off have been recalled to replace employees who have left the company.

11. This matter falls within the ambit of section 79(4a) which places the burden of proof in a complaint such as this upon the employer. The Board referred to the nature of the onus which falls to the respondent in these matters in the *Pop Shoppe (Toronto) Limited* case [1976] OLRB Rep. June 299, wherein at paragraph 4 the Board stated:

"Section 79(4a) of *The Labour Relations Act* places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer's actions must be devoid of 'anti union animus.' (See the *Bushnell* case (1974), 4 O.R. (2d) 332.) The employer cannot engage in anti union activity under the



guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct of 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 990.)”

12. The Board has reviewed the evidence in this case and is satisfied that the decision to lay off was devoid of anti-union motive. The evidence establishes that the financial state of the company was such that as of July 30, 1979 its future existence was at stake. Messrs. Maruyama and Shimomura were sent by Sekisui to investigate and make recommendations as to the running of the company well before July 16th when the company first became aware of trade union activity. They recommended the discontinuance of the wrap program which later formed a part of the operating plan put to Mr. Noda on July 20th. The Board is satisfied that the company devised an operating plan in response to its financial difficulties, and without regard to the trade union activity of its employees, which necessitated the lay-off of 23 employees. The Board is further satisfied that the decisions as to which employees to lay off were made without regard to trade union activity. The decision to lay off and the decision as to who to lay off were not, therefore, in violation of the Act.

13. The Board is not satisfied, however, that the timing of the layoffs was devoid of anti-union motive. The evidence establishes that initially the company intended to lay off effective August 3rd. Mr. Aylesworth testified that the date of layoff was moved up from Friday, August 3rd to Monday, July 30th but that he did not know why. The tone of Mr. Aylesworth's letter dated July 27th which was placed in the time card slots of all employees during the weekend prior to Monday, July 30th, suggests that the decision to lay off on the Monday was made after the letter was written. It strains credulity to suggest that the letter was intended to illicit “continued support” from employees who were about to be laid off that day. Regardless of the precise moment of the decision, the decision-makers were aware of the application for certification at the time a decision was made which, if allowed to stand, will markedly effect the membership position of the applicant as of the date of its application for certification.

14. The Board, in processing applications for certification, looks to the membership support enjoyed by the applicant trade union as of the date of application. If an employee is not at work on the date of the application the Board applies what is referred to as its “30/30 rule”. Employees who have worked in the 30 days preceding the date of application *and* have worked or are expected to work in the 30 days following the date of application are considered by the Board to be employees as of the date of application who are eligible for the membership count. In this case the plant was closed for annual vacation on July 23, 1979, the date of application, and reopened on Monday, July 30th. Although most of the bargaining unit employees had worked in the 30 days prior to the application, very few were at work on the date of application because of the vacation shut down. Those who were laid off prior to returning to work (those on the afternoon and night shifts) would not be expected to work during the 30 days following the application and would not, therefore, be eligible for purposes of the membership count. If the layoff had occurred on Friday, August 3rd as had

been the initial plan of the company, these employees would have worked during the 30 day period following the date of application and would, therefore, satisfy both ends of the "30/30 rule" and be eligible for purposes of the count. The effect of the company's decision to move forward the date of layoff, if allowed to stand, is to reduce the union's membership support among those eligible for the membership count from a level which would support outright certification to a level requiring dismissal.

15. We have not been satisfied on the evidence that the company's decision to advance the date of layoff was devoid of anti-union motive. The company has not come forward with a credible explanation to explain its decision to move the date of layoff from August 3rd to July 30th at a time when it was aware that the union had filed an application for certification on July 23, 1979. Indeed, no one was called to testify who had knowledge of the motive for making a decision which could have a direct effect on the success of the union's application for certification. Accordingly, we hereby find that the decision to move the date of layoff forward from August 3rd to July 30th was in violation of the Act.

16. The effect of the Board's decision is to reinstate those who were laid off for the period July 30th to August 3rd inclusive. The Board is satisfied that if the layoff had occurred on August 3rd as initially planned the company would not have been in violation of the Act. The remedial order of the Board, therefore, is restricted to the period July 30 to August 3, 1979, inclusive. All of the employees who were laid off on July 30th are now eligible for purpose of the membership count in determining the union's membership support for purposes of certification. Any employee who was laid off on July 30th and who did not receive payment in lieu of notice for the period July 30th to August 3rd is entitled to be made whole for this period and the Board hereby directs that such employees, if there are any be compensated for lost wages for the period July 30th to August 3rd inclusive.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1979

### BARGAINING AGENTS CERTIFIED DURING SEPTEMBER

#### No Vote Conducted

**1231-78-R:** International Molders & Allied Workers Union (Applicant) v. Rehau Plastiks of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Prescott, Ontario, save and except persons above the rank of lead hand, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (26 employees in the unit).

**1351-78-R:** Ontario Public Service Employees Union (Applicant) v. The Children's Aid Society of the City of London and the County of Middlesex (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the Family and Children's Services of the City of London and the County of Middlesex save and except Supervisors, persons above the rank of Supervisor, students employed during school vacation periods, persons regularly employed not more than 24 hours per week, and the persons covered by the subsisting collective agreement." (97 employees in the unit).

Unit #2: "all employees of the Family and Children's Services of the City of London and the County of Middlesex regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (20 employees in the unit).

**1856-78-R:** Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Tip-Top Tailors (Respondent).

Unit: "all full-time employees of the respondent, at Thornhill, Ontario, save and except Store Manager and persons above the rank of Store Manager." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1873-78-R:** Local Union 636 of the International Brotherhood of Electrical Workers A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Public Utilities Commission of the Corporation of the City of Chatham Known as – The Chatham Hydro-Electric System (Respondent).

Unit: "all employees of the respondent, save and except foremen and supervisors and persons above the rank of foreman and supervisor, Treasurer, assistant to the Treasurer, secretary to the Manager, the Consumer Services Representative, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed on a co-operative training program." (44 employees in the unit).

**0222-79-R:** Hotel & Restaurant Employees' Union, Local 756 (Applicant) v. Terminal Hotel (Respondent) v. Group of Employees (Objectors).

Unit: "all bartenders, waiters, cashiers, busboys and doormen employed by the respondent at its licensed premises at 180 King Street East, Hamilton, Ontario, save and except managers and those above the rank of manager." (14 employees in the unit).

**0241-79-R:** Lakehead University Faculty Association (Applicant) v. Board of Governors, Lakehead University (Respondent) v. Employees (Objectors).

Unit #1: "all employees who are members of the full-time academic staff at Lakehead University in the City of Thunder Bay with the academic rank of lecturer, assistant professor, associate professor, or professor, or with an appointment as laboratory instructor, teacher counsellor, or sessional lecturer teaching two or more full course equivalents or having eighteen or more contact hours per week of field instruction during the fall/winter terms, save and except the president, vice-presidents, deans, members of the Board of Governors, individuals holding administrative positions provided that more than fifty per cent of their salary at the University is received for their administrative functions, research associates, research assistants, post-doctoral fellows, academic staff employed at Lakehead University while on leave from other employers, and professional librarians." (213 employees in the unit).

Unit #2: "all full time professional librarians employed by Lakehead University in the City of Thunder Bay save and except chief librarian, persons above the rank of chief librarian, and persons covered by subsisting collective agreements." (6 employees in the unit).

**0667-79-R:** Labourers' International Union of North America, Local 607 (Applicant) v. Gilcar Supervision & Management Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Township of O'Brien and the surrounding Townships of Williamson, Teetzel, Gurney, Fauquier, Nansen, Swanson, Sulman and Owens, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**0706-79-R:** Canadian Union of Public Employees (Applicant) v. Lenadco Home for the Aged (Respondent).

Unit: "all employees of the Respondent working in the Lenadco Home for the Aged in the County of Lennox and Addington save and except supervisors, persons above the rank of supervisor, registered nurses, confidential secretary to the administrator, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (85 employees in the unit). (*Having regard to the agreement reached by the parties*).

**0736-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Frank Plastina & Costa Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers, cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (37 employees in the unit). (*Having regard to that policy of the Board, and having heard and considered the representations of the parties*).

**0737-79-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 736 (Applicant) v. Wabar Limited (Respondent).

Unit: "all ironworkers and ironworker' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*).

**0758-79-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affi-

liated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Erie & Huron Beverages Limited (Respondent).

Unit: "all employees of the respondent regularly employed at Chatham, Ontario, for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office staff and those covered by a subsisting collective agreement." (6 employees in the unit). (*Having regard to the above*).

**0804-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Dynamic Circuits Corporation Limited and/or 418514 Ontario Limited, carrying on business as Proto Circuits (Respondents) v. Group of Employees (Objectors).

Unit: "all employees of the respondents, employed in the City of Hamilton, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons employed for less than twenty four hours per week and students employed during the school vacation period." (17 employees in the unit).

**0854-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Edict Investments Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeusing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0861-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Evercrete Limited (Respondent).

Unit: "all employees of the respondent at Maple, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by a certificate issued by the Board." (10 employees in the unit).

**0874-79-R:** The National Steel Car Guards Union (Applicant) v. National Steel Car Corporation Limited (Respondent) v. United Steelworkers of America (Intervener).

Unit: "all security officers employed by the respondent at its plant in Hamilton, Ontario, save and except Officer in Charge and persons above the rank of Officer in Charge." (10 employees in the unit). (*Having regard to the agreement of the parties*).

**0912-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. R. J. Moss Mechanical Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondents within a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0915-79-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. A. B. Chance Company of Canada Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff." (36 employees in the unit). (*Having regard to the agreement of the parties*).



**0916-79-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. Rank City Wall Canada Limited (Respondent).

Unit: "all employees of the respondent at 2 Bloor Street West, save and except senior building systems operators, persons above the rank of senior building systems operator, building services supervisor, persons above the rank of building services supervisor, security, office and clerical personnel, persons employed for less than 24 hours per week and students employed during the school vacation period." (10 employees in the unit). (*Having regard to the agreement of the parties*).

**0928-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Faran Construction Co. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeising and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (25 employees in the unit).

**0931-79-R:** International Association of Bridge, Structural and Ornamental Iron Workers Local 765 (Applicant) v. G & H Steel Service Quebec Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

**0933-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Peter Excavating & Grading Limited (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0935-79-R:** International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Comart Auto Wholesale Limited (Respondent).

Unit: "all employees of the respondent employed at Thunder Bay, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in the unit).

**0937-79-R:** The Canadian Union of Public Employees (Applicant) v. Residence Prescott & Russell Residence (Respondent).

Unit: "all employees of the respondent, in the Town of Hawkesbury, save and except professional and medical staff, graduate nursing staff, undergraduate nursing staff, graduate pharmacist, dietitian, student dietitian, office and clerical staff, maintenance supervisor, kitchen supervisor and housekeeping supervisor." (61 employees in the unit). (*Having regard to the agreement of the parties*).

**0947-79-R:** Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Laidlaw Transportation Limited (Respondent).

Unit: "all employees of the Maintenance Department working in and out of the Respondent's Garage in the City of Hamilton, save and except foreman, persons above the rank of foreman and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

**0954-79-R:** Office and Professional Employees International Union (Applicant) v. Master Mailers Limited (Respondent).

Unit: "all employees of Master Mailers Limited in the Regional Municipality of Ottawa-Carleton save and except the office manager, the production manager, the warehouse manager and persons above the ranks of office manager, production manager and warehouse manager." (30 employees in the unit). (*Having regard to the agreement of the parties*).

**0961-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Ayerswood Developments Limited (Respondent).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

**0963-79-R:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local #124 Ottawa-Hull (Applicant) v. Carrier Bros. (Respondent)

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note*).

**0964-79-R:** International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Astro Interior Finishing Co. Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeusing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." ( employees in the unit). (*clarity note*).

**0965-79-R:** United Steelworkers of America (Applicant) v. Cross Tube Products Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (33 employees in the unit).

**0972-79-R:** International Brotherhood of Painters and Allied Trades, Local Union 1824 (Applicant) v. Reinhardt's Window Planning Centre (Respondent).

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**0973-79-R:** Labourers' International Union of North America – Local 1081 (Applicant) v. Varamae Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**0984-79-R:** The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on Behalf of its affiliated Local Unions 785, 1316, 1617 and 2041 (Applicant) v. Host Drywall & Acoustic per 358083 Ontario Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, engaged in the installation and erection of acoustical and drywall systems, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*clarity note*).

**0985-79-R:** Labourers' International Union of North America, Local Union 183 (Applicant) v. Hi-Wall Concrete Forming (Respondent).

Unit: “all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

**0986-79-R:** Canadian Paperworkers Union (Applicant) v. Milno-Markham Manufacturing Co. Ltd. (Respondent).

Unit: “all employees of the Company at Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for less than twenty-four (24) hours per week and students employed during the school vacation period.” (12 employees in the unit). (*Having regard to the agreement of the parties*).

**0987-79-R:** Ontario Nurses' Association (Applicant) v. The Heritage Nursing Home Limited (Respondent).

Unit #1: “all registered and graduate nurses regularly employed in a nursing capacity at The Heritage Nursing Home in Toronto save and except the director of nursing, persons above the rank of director of nursing and registered and graduate nurses regularly employed for not more than twenty-four hours per week.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity at The Heritage Nursing Home in Toronto save and except the director of nursing and persons above the rank of director of nursing.” (5 employees in the unit). (*Having regard to the further agreement of the parties*).

**0995-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Maple Leaf Forming Company Limited (Respondent).

Unit: “all employees of the respondent engaged in concrete forming on residential buildings in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).



ing in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**1007-79-R:** Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Corporation of the County of Simcoe, Sunset Manor Home for the Aged, Collingwood (Respondent).

Unit: “all employees of Corporation of the County of Simcoe, Sunset Manor Home for the Aged, Collingwood, who are employed regularly for not more than 24 hours per week, and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, and persons covered by a subsisting collective agreement.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

**1017-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Lorbel Developments Limited carrying on business as Canada Homes (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeising and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

**1018-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Colvo Contracting Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeising and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

**1019-79-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. W. G. How (Toronto) Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**1033-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Affirmed Forming (Respondent).

Unit: “all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeising and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in the unit).

**1037-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Eton Construction Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1049-79-R:** Labourers' International Union of North America, Local 527 (Applicant) v. E. S. Martin Construction Inc. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

**1056-79-R:** Christian Labour Association of Canada (Applicant) v. Seaway Mechanical Contracting Ltd. (Respondent).

Unit: "all plumbers, plumbers' apprentices, sheet metal workers and sheet metal workers' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Hal-dimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

**1066-79-R:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Acadian Acoustic Co. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeasing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note*).

**1072-79-R:** Local Union 785, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bradsil Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

**1073-79-R:** United Steelworkers of America (Applicant) v. Procam Steel Products Limited (Respondent).

Unit: "all employees of the respondent in Pembroke, Ontario save and except foremen, persons above the rank of foremen, office and sales staff." (37 employees in the unit). (*Having regard to the agreement of the parties*).

**1133-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. W. A. Stephenson Construction Co. Limited (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener).

Unit: "all employees of the respondent in the County of Simcoe and the District Municipality of Muskoka engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

## Applications Certified Subsequent to a Pre-Hearing Vote

**0556-79-R:** International Union, United Automobile, Aerospace, Agricultural Implement Workers of America UAW (Applicant) v. Daymond Limited (Respondent) v. Daymond Co. Ltd. Shop Union (Intervener).

Unit: "all employees of the respondent at its Aluminum Division plant in Chatham, Ontario, save and except foreman and persons above the rank of foreman, and office and sales staff, and Maintenance Department, students employed during the school vacation periods and employees regularly employed for not more than 24 hours per week." (211 employees in the unit).

Number of names of persons on revised voters' list		201
Number of persons who cast ballots	180	
Ballots segregated and not counted	5	
Number of ballots marked in favour of applicant	154	
Number of ballots marked in favour of intervener	21	

**0913-79-R:** Service Employees International Union, Local 204 (Applicant) v. John Noble Home (Respondent).

Unit: "all employees of the John Noble Home in Brantford, Ontario who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nursing staff, graduate pharmacists, graduate dieticians, technical personnel, supervisors, persons above the rank of supervisor, office staff, adjuvants, assistant adjuvants, and persons covered by subsisting collective agreements." (122 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		117
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant	44	
Number of ballots marked against applicant	4	

## Application Certified Subsequent to Post-Hearing Vote

**0855-79-R:** Ontario Nurses' Association (Applicant) v. West Park Hospital (Respondent) v. Service Employees International Union, Local 204 (Intervener).

Unit: "all registered and graduate nurses engaged in a nursing capacity by the respondent in the Borough of York, save and except Head Nurses, persons above the rank of Head Nurse and persons regularly employed for not more than 24 hours per week." (95 employees in the unit).



Number of names of persons on list as originally prepared by employer		94
Number of persons who cast ballots		67
Number of ballots marked in favour of applicant	62	
Number of ballots marked in favour of intervener	5	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0962-78-R:** Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Tip Top Tailors (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent in its retail stores in Mississauga, save and except store manager, persons above the rank of store manager and persons regularly employed for not more than 24 (twenty-four) hours per week." (12 employees in the unit). (*Dismissed*).

Unit #2: "all employees of the respondent in its retail stores in Mississauga regularly employed for not more than 24 (twenty-four) hours per week save and except store manager and persons above the rank of store manager." (12 employees in the unit). (*Certified*).

**0242-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rotomatic Display Products Ltd. (Respondent). (3 employees).

**0611-79-R:** Christian Labour Association of Canada (Applicant) v. Niagara Retirement Manor Inc. (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at St. Catharines, Ontario, regular employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, office staff, supervisors and persons above the rank of supervisor." (8 employees in the unit). (*Bargaining Unit #1 – See Certification Dismissed Subsequent to Post-Hearing Vote*).

**0626-79-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Underground Services Limited (Respondent) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada (Intervener #1) v. The Ontario Provincial Conference of the Operative Plasterers and Cement Masons International Association of the United States and Canada on behalf of Locals no. 48, 124, 151, 162, 344, 345, 598, and 915 (Intervener #2) v. Labourers' International Union of North America, Local 183 (Intervener #3). (3 employees).

**0778-79-R:** Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. The Ontario Jockey Club (Respondent). (266 employees).

**0802-79-R:** Aclo Compounders Inc., Employees' Association (Applicant) v. Aclo Compounders Inc., (Cambridge-Hespeler, Ontario) (Respondent) v. United Steelworkers of America (Intervener). (41 employees).

**0896-79-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Bruce S. Evans Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener).

Unit: "all rod employees in the Board's geographic area #8, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**0918-79-R:** Canadian Union of Public Employees (Applicant) v. Central Branch of The Young Men's Christian Association of Metropolitan Toronto (Respondent).

Unit: "all employees of the respondent in Metro Toronto save and except professional staff, department managers, physical instructors, dietitians, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (39 employees in the unit). (*Having regard to the agreement of the parties*).

**0974-79-R:** The Alliance of Canadian Union Employees (Applicant) v. Canadian Air Line Employees' Association (Respondent). (9 employees).

**1070-79-R:** United Garment Workers of America (Applicant) v. Deacon Brothers Limited (Respondent). (2 employees).

### Certification Dismissed Subsequent to Pre-Hearing Vote

**0847-79-R:** The Canadian Union of Public Employees (Applicant) v. Parisien Manor Nursing Home (Respondent) v. Group of Employees (Objectors).

Voting Constituency: "All employees of the respondent in the City of Cornwall save and except professional medical staff, registered nurses, graduate nurses, undergraduate nursing staff, physiotherapists, occupational therapists, graduate pharmacists, undergraduate pharmacists, dieticians, student dieticians, supervisors and persons above the rank of supervisor." (57 employees in the unit).

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	48
Number of spoiled ballots	1
Number of ballots marked in favour of the applicant	6
Number of ballots marked against applicant	41

### Certification Dismissed Subsequent to Post-Hearing Vote

**0496-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. E. C. King Contracting, a Division of Morcam Group Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of E. C. King Contracting, a Division of Morcam Group Limited, working in O.L.R.B. Area 28 engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and operators working in the respondent's Chappels, Lamont and Town of Port Elgin gravel pits, save and except non-working foremen and persons above the rank of non-working foreman." (47 employees in the unit).

Number of names of persons on revised voters' list		57
Number of persons who cast ballots		55
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	45	

**0567-79-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. The Clorox Company of Canada Ltd. (Respondent).

Unit: "all employees of the respondent at Bramalea, Ontario, save and except supervisors, foremen, persons above the rank of supervisor or foreman, office and sales staff and students employed during the school vacation period." (23 employees in the unit).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots		46
Number of ballots marked in favour of the applicant	16	
Number of ballots marked against the applicant		30

**0569-79-R:** United Cement, Lime and Gypsum Workers International Union, AFL-CIO-CLC (Applicant) v. GTE Sylvania Canada Limited, Electronic Components & Systems Division (Respondent).

Unit: "all employees of the respondent located in the City of Belleville, Ontario, County of Hastings, save and except foreman and supervisor." (15 employees in the unit).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots		14
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant		7

**0611-79-R:** Christian Labour Association of Canada (Applicant) v. Niagara Retirement Manor, Inc. (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at St. Catharines, Ontario, save and except registered and graduate nurses, office staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots		13
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant		8

*(Bargaining Unit #2 – See Application for Certification Dismissed – No Vote Conducted).*

**0614-79-R:** Upholsterers International Union of North America AFL/CIO (Applicant) v. Faultless-Doerner Manufacturing Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Stratford, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (61 employees in the unit).



Number of names of persons on list as originally prepared by employer		40
Number of persons who cast ballots		37
Number of ballots marked in favour of the applicant	15	
Number of ballots marked against the applicant		22

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0591-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. P. Molnar Inc. Molnar Painting Inc. (Respondent). (3 employees).

**0704-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Korsan Limited (Respondent). (10 employees).

**0806-79-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Superior Glove Works Limited (Respondent). (59 employees).

**0842-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 38 (Applicant) v. Elrose Construction Co. (Respondent). (2 employees).

**0844-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. A. K. Penner & Sons Ltd. Penner Development Inc. (Respondent) v. Christian Labour Association of Canada (Intervener). (3 employees).

**0892-79-R:** Lawment Trade Union (Applicant) v. Barry J. Lawrence Management Ltd. (Respondent). (16 employees).

**0907-79-R:** Office and Professional Employees International Union (Applicant) v. Ontario Liquor Board Employees Union (Respondent). (3 employees).

**0932-79-R:** Canadian Union of Public Employees (Applicant) v. Stella Buck Work Activity Project (Respondent). (6 employees).

**0934-79-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Internorth Construction Company Limited (Respondent). (3 employees).

**1032-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Rental Excavating Ltd. (Respondent). (3 employees).

**1061-79-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. G. B. Wonder, Toronto, Ontario (Respondent). (8 employees).

**1062-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Consolidated Building Maintenance Company (Respondent). (8 employees).

**1119-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. CD Drywall Construction (Respondent). (2 employees).

## **APPLICATION UNDER SECTION 1(4)**

**0157-79-R:** Resilient Floor Workers Local Union 2965, United Brotherhood of Carpenters & Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (Applicants) v. Barwood Sales (Ontario) Limited and Realwood Floor Installations Ltd. (Respondents).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**0346-79-R:** Mrs. Carol Killman; Mrs. Rosemary LaForme (Applicants) v. Canadian Union of Public Employees (Respondent) v. Groves Park Lodge (Intervener). (21 employees). (*Dismissed*).

**0926-79-R:** Eva Margaret Gawley (Applicant) v. Local Union #1976 Pharmacists and Professional Employees Association, Chartered by Retail Clerks International Union, affiliated with the Canadian Labour Congress, and AFL-CIO (Respondent) v. Madoc Manor Lodge and Retirement Home (Intervener). (5 employees). (*Granted*).

## **APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL**

**0722-79-U:** Canadian Pittsburgh Industries, a Division of PPG Industries Canada Limited (Applicant) v. John Mount, J. Cooper, M. Crosier, E. Belazs, and others, and Canadian Chemical Workers Union, Local 14 (Respondents). (*Withdrawn*).

**1005-79-U:** The Lummus Company Canada Limited (Applicant) v. Robert Adams, George Aitken, et al (Respondents). (*Granted*).

**1022-79-U:** Electrical Power Systems Construction Association (Applicant) v. D. W. McIntyre and J. Carruthers on their own behalf and on behalf of the Ontario Allied Construction Trades Council, H. W. Ingham, J. H. Kennedy, et al (Respondents). (*Granted*).

**1024-79-U:** Whitby Welding Limited (Applicant) v. International Association of Bridge Structural and Ornamental Iron Workers (Collectively "Local 721") (Respondent). (*Withdrawn*).

**1107-79-U:** Holscot Construction Limited and General Contractors Section of the Toronto Construction Association (Applicants) v. Toronto Building and Construction Trades Council, Dave Johnson (Respondents). (*Withdrawn*).

**1183-79-U:** Canadian Engineering and Contracting Co. Limited (Applicant) v. Stanley Quin (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**0307-79-U:** Jacques Bradette, Hilton Rosemarin (Applicants) v. Purple Heart Film Corporation, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and Hugh Montgomerie (Respondents). (*Dismissed*).

**0761-79-U:** International Union of Operating Engineers, Local 793 (Applicant) v. Esam Construction Limited (Respondent). (*Withdrawn*).

**0925-79-U:** Labourers' International Union of North America, Local 183 (Applicant) v. A. E. LePage (Ontario) Ltd. (Respondent). (*Withdrawn*).

**1111-79-U:** Holscot Construction Limited and General Contractors Section of the Toronto Construction Association (Applicants) v. Toronto Building and Construction Trades Council, Dave Johnson (Respondents). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**1873-77-U:** Josephine Chambers (Complainant) v. Honeywell Ltd. and Doreen Baznick Chairman, Local 80, U.A.W. (Respondent). (*Withdrawn*).

**1931-78-U:** Ontario Nurses' Association (Complainant) v. St. Magdaline Nursing Home Ltd. (Respondent). (*Withdrawn*).

**1980-78-U:** Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Tempglass Ltd. (Respondent). (*Withdrawn*).

**0296-79-U:** The Canadian Union of Public Employees and its Local 2103 (Complainant) v. Groves Park Lodge (Respondent). (*Withdrawn*).

**0306-79-U:** Jacques Bradette, Hilton Rosemarin (Complainants) v. Purple Heart Film Corporation, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and Hugh Montgomerie (Respondents). (*Granted*).

**0509-79-U:** Hotel, Restaurant Employees Union, Local 743 (Complainant) v. Lakewood Golf Club Ltd. (Respondent). (*Withdrawn*).

**0702-79-U:** John St. Hilaire (Complainant) v. U.A.W. Local 1459 (Respondent). (*Dismissed*).

**0723-79-U:** Amalgamated Clothing and Textile Workers' Union, (Toronto Joint Board) (Complainant) v. Straton Knitting Mills Limited (Respondent). (*Withdrawn*).

**0742-79-U:** Cecil Anthony Ritchie (Complainant) v. Upholsterers' International Union of North America AFL-CIO-CLC, Local 51 (Respondent) v. Sklar Furniture Limited (Chair Division) (Intervener). (*Withdrawn*).



**0762-79-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Esam Construction Limited (Respondent). (*Granted*).

**0768-79-U:** The United Brotherhood of Carpenters & Joiners of America Local Union 1669 (Complainant) v. West York Construction Ltd. (Respondent). (*Granted*).

**0781-79-U:** Retail Clerks Union, Local 206 (Complainant) v. Tip Top Tailors (Respondent). (*Withdrawn*).

**0807-79-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Superior Glove Works Limited (Respondent). (*Withdrawn*).

**0808-79-U:** David John Foreman (Complainant) v. Richmond Street Health Emporium Ltd. (Respondent). (*Withdrawn*).

**0809-79-U:** Mario Moreira (Complainant) v. Labourers' International Union of North America, Local 506; Labourers' International Union of North America (Respondents) v. Ontario Hydro (Intervener). (*Dismissed*).

**0819-79-U:** Kuldip Singh Samra (Complainant) v. United Glass and Ceramic Workers of North America, Local 200 (Respondent) v. Consumers Glass Company Limited (Intervener). (*Granted*).

**0866-79-U:** Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital (Respondent). (*Withdrawn*).

**0893-79-U:** Gregory Monteiro (Complainant) v. Allatt Limited (Respondent). (*Withdrawn*).

**0920-79-U:** Ontario Taxi Association 1688, Canadian Labour Congress (Complainant) v. Central Taxi, St. Catharines (Respondent). (*Withdrawn*).

**0921-79-U:** Canadian Union of Public Employees Local 32 (Complainant) v. The Corporation of the City of Cambridge (Respondent). (*Withdrawn*).

**0929-79-U:** Labourers' International Union of North America, Local 183 (Complainant) v. A. E. LePage (Ontario) Ltd. (Respondent). (*Withdrawn*).

**0942-79-U:** Gerald M. Massicotte (Complainant) v. Teamsters Union Local 938 (Respondent) v. Humes Transport Ltd. (Intervener). (*Withdrawn*).

**0977-79-U:** Clara Smith and Georgia Nicholas (Complainants) v. Carefree Lodge (Respondent). (*Withdrawn*).

**0989-79-U:** Giovanni Clausi (Complainant) v. Retail, Wholesale and Department Store Union, AFL-CIO:CLC and its Local 414 (Respondent). (*Dismissed*).

**1008-79-U:** Pharmacists and Professional Employees Association Local 1976 chartered by the Retail Clerks International Union (Complainant) v. Grandview Lodge (Respondent). (*Withdrawn*).

**1020-79-U:** United Steelworkers of America (Complainant) v. Cross Tube Products Inc. (Respondent). (*Withdrawn*).

**1023-79-U:** Joseph William Martin (Complainant) v. General Motors of Canada Limited (Respondent). (*Withdrawn*).

**1046-79-U:** Newspaper Agents Association (Complainant) v. The Globe & Mail, Division of F. P. Publications (Eastern) Limited (Respondent). (*Withdrawn*).

**1058-79-U:** Canadian Union of Fast Food and Service Workers (Complainant) v. The Great Canadian Pizza Company, (Division of 401825 Ont. Ltd.) (Respondent). (*Withdrawn*).

**1075-79-U:** International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Complainant) v. Comart Auto Wholesale Limited (Respondent). (*Withdrawn*).

**1085-79-U:** Canadian Union of Fast Food and Service Workers (Complainant) v. The Great Canadian Pizza Company (Division of 401825 Ontario Ltd.) (Respondent). (*Withdrawn*).

**1089-79-U:** Canadian Union of Public Employees (Complainant) v. Young Men's Christian Association (Respondent). (*Withdrawn*).

## **APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**0826-79-M:** Mainco Industrial Cleaning Corporation of Canada Ltd. (Applicant) v. International Union of Allied Novelty & Production Workers, Local 905, (Formerly called the International Union of Doll, Toy & Novelty Workers of The U.S. & Canada, Local 905 (Respondent). (*Withdrawn*).

## **JURISDICTIONAL DISPUTE**

**0654-79-JD:** Local 1330, United Paperworkers International Union, Kenora Ontario (Complainant) v. Boise Cascade Canada Ltd. (Respondent). (*Dismissed*).

## **APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82**

**0655-79-M:** Ontario Public Service Employees Union (Trade Union) v. Seneca College of Applied Arts and Technology (Employer). (*Withdrawn*).

## **APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)**

**0724-78-M:** Office and Professional Employees International Union, Local 290 (Applicant) v. Hamilton Wentworth Credit Union Limited (Respondent). (*Withdrawn*).

**0446-79-M:** The Corporation of the Town of Cochrane (Employer) v. Canadian Union of Public Employees (Trade Union). (*Withdrawn*).

**0848-79-M:** London and District Service Workers' Union, Local 220 (Applicant) v. Central Park Lodges of Canada (Kitchener). (Respondent) (*Withdrawn*).

**0849-79-M:** Retail Clerks International Union, Local 233F (Applicant) v. J. H. McNairn, Limited (Respondent). (*Withdrawn*).

## REFERENCE TO BOARD PURSUANT TO SECTION 96

**0883-79-M:** Roozen's Limited (Employer) v. The Hotel and Restaurant Employees Union, Local 743 (Trade Union). (*Withdrawn*).

## APPLICATIONS UNDER SECTION 112A

**1124-77-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Master Insulators' Association of Ontario, Incorporated and B & D Insulation Ltd. (Respondents).

- and -

**1125-77-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Master Insulators' Association of Ontario, Incorporated and Commercial & Industrial Insulations Limited (Respondent).

- and -

**1126-77-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Master Insulators' Association of Ontario, Incorporated and Mooretown Insulation Contractors Ltd. (Respondents)

- and -

**1127-77-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Canadian B & D Insulation Ltd. (Respondents)

- and -

**1128-77-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Master Insulators' Association of Ontario, Incorporated and A.C. & S. Contracting Ltd. (Respondents)

- and -

**1129-77-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Master Insulators' Association of Ontario, Incorporated and Lewis Insulation Services Ltd. (Respondents). (*Dismissed*).

**1882-78-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. The Master Insulators' Association of Ontario, Incorporated and Master Insulation Company Limited (Respondents). (*Granted*).

**0908-79-M:** Labourers' International Union of North America, Local 527 (Applicant) v. Quenneville Brothers Limited (Respondent). (*Withdrawn*).

**0939-79-M:** Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Form Work Association & Commerce Masonry & Forming Ltd. (Respondents). (*Granted*).



**0943-79-M:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dorssers Welding Company Limited and The Association of Millwrighting Contractors of Ontario (Respondents). (*Granted*).

**0944-79-M:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Association of Millwrighting Contractors of Ontario; Sadler Conveyor & Equipment (Respondent). (*Withdrawn*).

**0949-79-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233. United Brotherhood of Carpenters and Joiners of America (Applicant) v. Conklin and Garrett Limited (Respondent). (*Granted*).

**0983-79-M:** United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Malco Artisans Limited (Respondent). (*Withdrawn*).

**0998-79-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Combustion Engineering Company (Respondent). (*Withdrawn*).

**1016-79-M:** Labourers' Local 1089 of L.I.U.N.A. (Applicant) v. Sandercock Construction (1976) Limited (Respondent). (*Withdrawn*).

**1048-79-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Town Paving Company (1965) Limited (Respondent). (*Withdrawn*).

**1080-79-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Field Construction Ltd. (Respondent). (*Withdrawn*).

**1082-79-M:** International Union of Operating Engineers, Local 793 and its member John Ottenhof (Applicant) v. D. A. Foley Construction Ltd. (Respondent). (*Dismissed*).

**1097-79-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Stewart and Hinan Contractors Limited (Respondent). (*Withdrawn*).

**1098-79-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Jack Harper Construction Limited (Respondent). (*Withdrawn*).

**1099-79-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. John Tries Construction Limited (Respondent). (*Withdrawn*).

**1100-79-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 38, (Applicant) v. W. Benson and Son Limited (Respondent). (*Withdrawn*).

**1103-79-M:** United Brotherhood of Carpenters and Joiners of America, Local Union 38, (Applicant) v. Hope Loch Construction Limited (Respondent). (*Withdrawn*).

**1113-79-M:** Rodmen Employee Bargaining Agency consisting of International Association of

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**1115-79-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. McBrien Insulation Master Insulators Association of Ontario, Incorporated (Respondents). (*Withdrawn*).

### **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**1280-78-U:** Dennis H. O'Keefe (Complainant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880 (Respondent) v. Concrete Construction Supplies (Intervener). (Section 79). (*Request Denied*).

**1686-78-M:** Stanley A. Brown (Applicant) v. Ontario Public Service Employees Union (Respondent Employees Organization) v. Centennial College of Applied Arts (Respondent Employer). (Section 39). (*Request Denied*).









Labour  
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**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1979] OLRB REP.**

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**0843-79-R** United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Applicant, v. **The Anderson Company**, Anderco, Inc. Respondents.

**Constitutional Law – Construction Industry – Work performed on international bridge – Whether under provincial jurisdiction**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

**APPEARANCES:** *H. P. Rolph and W. Sherman for the applicant; non one appearing for the respondents.*

**DECISION OF THE BOARD;** November 20, 1979

1. This is an application for certification in which the applicant is seeking to be certified on behalf of all divers and diver tenders in the employ of the respondents in the District of Rainy River. The employees affected by the application were on the application date employed on the construction of a new bridge which when completed will span the Rainy River and link Fort Frances, Ontario with International Falls, Minnesota.

2. The respondents did not challenge the jurisdiction of the Board to entertain this application. However, the Board itself raised the matter of its constitutional jurisdiction over employees engaged in the construction of an international bridge.

3. Generally, labour relations matters fall within provincial jurisdiction. See: *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. However, the Federal Parliament may assert jurisdiction over labour relations matters if such jurisdiction is an integral part of its primary competence over some other federal subject. See: *In the Matter of a Reference as to the Validity of The Industrial Relations and Disputes Investigation Act* ("the Stevedoring case") [1955] S.C.R. 529. The effect of section 92(10)(a) of *The British North America Act* is to give the Federal Parliament jurisdiction to make laws relating to works and undertaking extending beyond the limits of a province. Hence, there is no question but that once the bridge at Fort Frances is in operation it will fall under the legislative jurisdiction of the Federal Parliament. However, the question remains as to whether labour relations matters relating to employees engaged in the construction of the bridge is an integral part of Federal jurisdiction over works and undertakings extending beyond the limits of a province.

4. The Supreme Court of Canada dealt with a somewhat similar issue in *Montcalm Construction Inc. v. Minimum Wage Commission*, 79 CLC ¶14,190. That case concerned the question of whether Quebec's minimum wage laws applied to employees of a building contractor engaged in the construction of runways at the Mirabel Airport. It was the contention of the contractor that the wages and working conditions of his employees were subject only to the legislative jurisdiction of the Federal Parliament. The Court accepted that aeronautics was a matter within federal jurisdiction. The court also indicated that it regarded certain aspects of an airport's construction as coming within federal jurisdiction, including such matters as where it will be built and its design and specifications, since decisions with



respect to these issues would permanently be reflected in the structure of the finished product and also directly effect its operational qualities. However, a majority of the Court concluded that labour relations matters relating to employees engaged in construction work at the airport stood on a somewhat different footing and came within provincial jurisdiction. Mr. Justice Beetz, in giving the decision of the majority of the Court, made the following comments at pages 15,147-15,149:

“In the case at bar, the impugned legislation does not purport to regulate the structure of runways. The application of its provisions to Montcalm and its employees has no effect on the structural design of the runways; it does not prevent the runways from being properly constructed in accordance with federal specifications; nor has it even been shown, assuming it could be, that ‘the physical condition’ of the runways, as opposed to their structure, is affected by the wages and conditions of employment of the workers who build them. . . .

In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day-to-day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.

To accept Montcalm’s submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the *Agence Maritime* and *Letter Carriers*’ decisions. Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is acciden-

tal. And there is nothing specifically federal about their ordinary business.”

5. In our opinion, the reasoning of the majority of the Supreme Court in the *Montcalm* case is equally applicable to the facts before us. The operation of the bridge when completed, as well as certain factors relevant to its construction, are matters within the legislative competence of the Federal government. However, the ability to regulate the industrial relations of employees engaged in its construction does not form an integral part of federal jurisdiction under section 92(10)(a) of *The British North America Act*. Accordingly, in our view, the general provincial jurisdiction over labour relations applies, and this Board does have jurisdiction to entertain the instant application.

6. It might be noted that this conclusion appears to run counter to certain decisions of the Board relating to its jurisdiction over employees engaged in the construction of international bridges which were issued prior to the ruling of the Supreme Court of Canada in the *Montcalm* case. See, for example, *Robertson-Yates Corporation Limited*, [1962] OLRB Rep. Oct. 215 and *Industrial Construction Division Allied Structural Steel Company*, [1973] OLRB Rep. Dec. 636.

7. The applicant requested that the Board apply section 1(4) of the Act and treat the two respondents as constituting one employer for the purposes of the Act. Pursuant to section 1(5) of the Act, the respondents were under an obligation to adduce at the hearing all facts within their knowledge relevant to the issue of their common control or direction. Neither respondent attended at the hearing. Rather than seek an adjournment to compel the respondent's attendance, the applicant elected to itself lead evidence concerning the respondents' control and direction. This evidence indicates that the two respondent companies are under common direction or control, and that they are jointly involved in the work in question. In these circumstances, the Board is of the opinion that the two respondents are associated or related businesses which are being carried on under common control or direction, and that it would be appropriate to treat them as constituting a single employer. Accordingly, the Board declares The Anderson Company and Anderco, Inc. to constitute one employer for the purposes of *The Labour Relations Act*.

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12. A certificate will issue to the applicant.

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**1302-79-M** Avenue Structures, Chemello Contractors, Hauserman Ltd., Plyform Construction Co. Ltd. and Store Fixtures Unlimited Limited, Applicants, v. United Brotherhood of Carpenters and Joiners of America, Local 18, Respondent, v. **Labour Relations Bureau of the Ontario General Contractors Association**, Intervener.

Adjournment – Construction Industry – Damages – Union seeking adjournment due to unavailability of counsel – Board refusing adjournment – Union contravening manpower mobility provisions of province-wide agreement – Damages assessed at \$48,789.35 against Union

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**APPEARANCES:** *G. Grossman and Brian Foote appearing for the applicants and the intervener; no one appearing for the respondent.*

**DECISION OF THE BOARD;** November 19, 1979

1. The applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination pursuant to section 112a of *The Labour Relations Act*.
2. The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (the "Council") was named by the applicants as a person who might be affected by this referral. The Board served the Council with Form 80, Notice to Affected Person(s) of Referral of Grievance to Arbitration under section 112a and of Hearing, Construction Industry. The Council did not appear at the hearing of this referral.
3. The hearing in this matter was held on October 22, 1979. On October 18, 1979, the Board received the following letter:

"We act for the respondent in this matter. Further to a telephone conversation with George H. Grossman, solicitor for the applicants we confirm that we advised Mr. Grossman that our chief witness, J. R. Tarbutt, the business manager of the union would be in British Columbia from October 19th to October 29th and we could not proceed without him. Mr. Grossman was not agreeable to an adjournment.

We then advised Mr. Grossman that on behalf of the Carpenters Union the union is prepared to abide by the applicants' interpretations of the mobility provisions namely Article 5.07 of the collective agreement, without prejudice to its rights to file a grievance over the interpretation of Article 5.07.

We also advised Mr. Grossman that being counsel for the respondent



we were committed to an arbitration hearing in Hamilton on October 22nd and it was too late for us to make arrangements to have someone else appear for the union. The writer has represented this union for the last twenty years.

Mr. Fenwick, a business agent will be attending at the hearing to re-confirm the contents of this letter.

We are asking the Board to adjourn the hearing to a date convenient to the parties and the Board on the condition that the union abide by the employer's interpretation of the mobility provisions or that the matter be determined on the basis of the undertaking given by the union referred to in this letter."

A copy of this letter was sent to Mr. Grossman. At the commencement of the hearing Thomas Fenwick, a business agent for the respondent, was present. However, he declined to complete an appearance information sheet.

4. Mr. Grossman related to the Board the contents of a telephone conversation between himself and counsel for the respondent. Mr. Grossman was contacted by counsel for the respondent with a request that this referral be adjourned because of a commitment for another arbitration. Counsel informed Mr. Grossman that he was ninety-nine per cent certain that he could settle this referral and added that if he could not settle this referral he would use a law firm in Toronto to represent him at the instant hearing. Counsel informed Mr. Grossman that he did not think that the Board had to hear about the other law firm. Mr. Grossman indicated that he would not be prepared to agree to an adjournment because he felt there was a blatant violation of the collective agreement and because counsel had the rest of the week (from Tuesday, October 16) to arrange matters.

5. On October 17, 1979, Mr. Grossman received a telephone call from one of the Board's Labour Relations Officers who informed him that a letter was in the mail from counsel for the respondent in effect agreeing to settle this referral by abiding by the relevant article in the collective agreement. Mr. Grossman then spoke to counsel and discovered to his surprise that the story was somewhat different. He answered counsel that if there was a disagreement about the article in question then they should arbitrate the matter before the Board and not try to do two things at the same time. At this point, counsel, for the first time, indicated that Mr. J. R. Tarbutt, the respondent's business manager, would be out of town. Mr. Grossman again advised counsel that he could not agree to an adjournment and was advised that Mr. Fenwick would attend at the hearing.

6. Mr. Grossman stated that he was quite taken aback to see that counsel had inserted his telephone conversation in the letter to the Board and had believed that such conversations were privileged. Mr. Grossman further stated that he resented the fact that counsel had in his letter reversed the reasons for requesting an adjournment and invited the Board to draw its own conclusions.

7. Mr. Fenwick argued that it was not unusual for anyone to ask for an adjournment to a date a few days hence. He stated that this was particularly true where the dispute had been going on since September of 1978 and where there was only six months remaining be-

fore the collective agreement expired. Mr. Fenwick stressed that the respondent had received only two weeks notice, that Mr. Tarbutt had not had a holiday this year that his visit to British Columbia had been arranged some time ago. He stated that he had never heard of the law firm in Toronto and wondered why there was such a hurry when only one of the applicants was still working in Hamilton.

8. After hearing the representations before it, the Board ruled that it would not grant the respondent's request for an adjournment and that it would proceed to hear this referral in the absence of a settlement among the parties. The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated at page 433:

"5. The Board policy with respect to adjournments has been capsulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, ¶70 CLLC 14,024) wherein the Board stated:

"... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness ..."

The Board has held, in refusing to grant adjournments, that it is the responsibility of the complainant to do whatever is required to ensure that witnesses essential to its case are present at the hearing (see *Weston Bakeries* decision [1971] OLRB Rep. Jan. 30). The Board has further held that it is incumbent upon a party to properly prepare itself for a hearing which includes the obtaining and serving of the required summons (see: *Agilis Corporation Limited* decision [1971] OLRB Rep. Feb. 98). In the matter at hand counsel for the complainant chose not to serve summons on two witnesses whom he described as "crucial" to his case. He chose not to serve the two persons because he did not wish to interfere with their holidays. He argued that to have served them in the face of their holiday commitments would have been a "charade".

6. The purpose of a summons is to compel the attendance of witnesses at a hearing and as such it is an instrument which enables this Board to conduct its hearings at the appointed time and place and, more importantly, it is an instrument which provides a party with access to those witnesses who are essential to the presentation of its case. It is incumbent to the presentation of its case. It is incumbent upon a party seeking the attendance of a witness(es) to avail itself of this instrument. Counsel cannot decide against serving a potential witness, who has indicated that he will not attend, and then in the face of the person's non-atten-

dance, request an adjournment. If the Board (or any court for that matter) were to accede to such a request it would be inviting manipulation of its procedure causing undue delay and consequent prejudice to parties appearing before it. The Board, therefore, restates that in the circumstances of this case it has no alternative but to deny the request for an adjournment."

9. In the proceeding before it, the Board is required by virtue of section 112a(2) of the Act, to appoint a date for and hold a hearing within fourteen days after receipt of the referral. The provision is mandatory. This referral was filed on Friday, October 5, 1979, and was scheduled for hearing on Monday, October 22, 1979. The provisions of section 112a(2) provide an additional ground for not granting an adjournment in the circumstances of this referral. Normally, the Board is not aware of the private arrangements between counsel. In the instant referral, for the circumstances set forth earlier in this decision, the Board was made aware of the intention of counsel for the respondent to use a law firm in Toronto to represent him before the Board. There is nothing before the Board to suggest that this arrangement could not have been used by counsel for the respondent.

10. After the Board had ruled that it would not grant the respondent's request for an adjournment, Mr. Fenwick left the room in which the hearing was being held. Thereafter, the Board heard evidence from witnesses who were called upon to testify by the applicants. There was no cross-examination of these witnesses and no evidence was called on behalf of the respondent.

11. The evidence established that the applicants and the respondent are covered by a provincial collective agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Capreneters and Joiners of American effective from September 6, 1978, to April 30, 1980. The events which are subsequently referred to in this decision occurred during that period of time. This collective agreement contains article 5.07 which provides:

"(a) Except as set out otherwise in this Agreement, the Union shall allow mobility of manpower to an employer who has signed the voluntary agreement for province-wide recognition, a copy of which is attached hereto as Schedule "C".

(b) Such mobility of manpower shall be as follows: From one geographic area to any job or project in any other geographic area within the Province of Ontario, the employer may transfer four men in accordance with the following schedule.

	Out-of-Area	L.U. or D.C.	Total
First 2 men (see (c) below)	2	—	2
Next 4 men	—	4	6
Next 1 journeyman	1	—	7
Next 4 men	—	4	11
Next 1 journeyman	1	—	12
Maximum	4		



(c) Of the first two out-of-area men, one shall be a working foreman and one may be a journeyman or an apprentice. The maximum in the above schedule may be increased by such further number as may be agreed upon between the employer and the Local Union or District Council."

12. Robert Scott, the president of Store Fixtures Unlimited Limited ("Store Fixtures"), testified that he signed Schedule "C" on February 28, 1979 after the provincial collective agreement was signed. Thereafter Store Fixtures secured a contract to perform work in the Hamilton-Burlington area. In order to perform this contract Mr. Scott sent a working foreman and his apprentice to the project. Both of these men were members of Local 27 of the United Brotherhood of Carpenters and Joiners of America in Toronto. Mr. Fenwick arrived at the project, inquired about the nature of the project and asked if any men from the respondent would be hired. Mr. Scott indicated that perhaps two men from the respondent would be hired at a later date. Mr. Fenwick informed Mr. Scott that Store Fixtures would be allowed to have only one man from Toronto on the project and that the apprentice would have to return to Toronto. The apprentice returned to Toronto. On May 14, 1979, Store Fixtures signed Schedule "D" to the collective agreement which is a voluntary recognition with respect to the respondent. Notwithstanding the fact that Store Fixtures was bound by the provincial collective agreement, Mr. Scott signed Schedule "D" because the respondent requested it. The respondent informed Mr. Scott that Store Fixtures was not permitted to have the number of men on the site as provided by the provincial collective agreement because the respondent did not fully agree with its provisions and that in Hamilton it would be the respondent's interpretation of the collective agreement. Mr. Scott then informed the respondent that he would be starting a project in Stoney Creek. When Store Fixtures started this project in Stoney Creek it delivered materials and commenced work with a superintendent and a working foreman from Toronto. Mr. Fenwick appeared at the project and threatened to stop the project unless Store Fixtures had only one man on the project. Mr. Fenwick stated that Store Fixtures should have known better because of its experiences in Burlington. When Mr. Scott drew Mr. Fenwick's attention to the fact that Store Fixtures was a general contractor, Mr. Fenwick then stated that no further exceptions would be made and that Store Fixtures would have to remove one man from the project. Mr. Scott then arranged a meeting at the respondent's union hall with Mr. Fenwick and Mr. Tarbutt in order to secure clarification because Store Fixtures intended to hire further men for the project in Stoney Creek. The three men discussed article 5.07 at length and Mr. Tarbutt disputed the provisions of article 5.07 and informed Mr. Scott, "It's my court, my ball and my rules".

13. Store Fixtures uses a special design for its installations and its employees who are carpenters from Toronto are very familiar with the installation of this special design. Mr. Scott gave evidence that because he was unable to use his employees from Toronto as provided for in article 5.07 his projects were not completed on schedule. Store Fixtures under protest employed members of the respondent rather than the mix of employees provided for in article 5.07. This resulted in a loss in production and the completion of the installation in Stoney Creek was delayed by one week.

14. Joseph Chemello, the president of Chemello Contractors, testified that Chemello Contractors was essentially a forming contractor. Chemello Contractors has had for many years collective agreements covering carpenters in Toronto. Chemello Contractors was bidding on a project in Burlington. Before Mr. Chemello signed a contract he spoke to Messrs.

Tarbutt and Fenwick and asked them their requirements for work in Burlington. He asked if he could bring a foreman plus two carpenters from Toronto and whether they would supply four men in accordance with article 5.07. In separate telephone calls Mr. Tarbutt and Mr. Fenwick agreed that Mr. Chemello's proposal with respect to the work force was satisfactory. After receiving these assurances Mr. Chemello signed the contract.

15. After the commencement of the project in Burlington, Mr. Fenwick appeared and informed Chemello Contractors' foreman that Chemello Contractors could not have any labour from Toronto. At this point Mr. Chemello asked for a meeting with Mr. Tarbutt and Mr. Fenwick. They informed him that there was no way Chemello Contractors could bring its men from Toronto and that Mr. Chemello was lucky he could have his foreman on the project. Mr. Chemello then asked if he could at least have one more carpenter from Toronto on the project and was refused by Messrs. Tarbutt and Fenwick. Chemello Contractors had signed Schedule "C" with the Carpenters' District Council of Toronto and Vicinity on May 28, 1979. Chemello Contractors use a special system of quick forms and his regular work force is familiar with the system. When Mr. Chemello bid on the job he believed the project would take between three and four weeks. When Chemello Contractors was unable to use a crew as provided for by article 5.07 it was compelled to hire carpenters from the respondent. Due to the unfamiliarity of the respondent's carpenters with the special system the project was completed in six weeks. Chemello Contractors planned to have three carpenters and one foreman take three to four weeks to complete the project. In using the four carpenters from the respondent the project required six weeks for its completion.

16. Frank Grims, a foreman employed by Hauserman Ltd. ("Hauserman"), testified that during the summer of 1979 Hauserman performed a job at the head office of Dofasco. Mr. Grims and another man visited the respondent in order to obtain a permit to work. Mr. Grims was given a permit but his friend, Jimmy Wichaus, was denied a permit. Mr. Grims spoke to Mr. Tarbutt about his denial and was told that there was no way two men from Toronto could work in the jurisdictional area of the respondent. Mr. Wichaus did not work the day in question and returned to Toronto. The work involved the lifting of panels which each weighed three hundred and fifty pounds and Mr. Grims was not able to work by himself.

17. Hartley Irwin testified that he was the operations manager of Hauserman and that Hauserman had executed the Schedule "C" voluntary recognition agreement with the Carpenters' District Council of Toronto and Vicinity on September 21, 1978. The witness informed the Board that Hauserman manufactures and installs interior systems of steel. He contacted the respondent and was told that Hauserman could send only one man, a working foreman, from the Toronto local to work in Hamilton. Mr. Irwin gave evidence that on June 20, 1979, the day that Mr. Wichaus was refused a permit, Hauserman could not proceed with the project. On June 21, 1979, Mr. Grims went to the respondent and requested a carpenter. However, he was unable to obtain a carpenter because it meant working on a night shift. Mr. Grims and Mr. Wichaus charged Hauserman for four hours on that day plus mileage and travel time. The next day Mr. Grims worked only four hours when it was evident that he could not obtain a carpenter from the respondent and could not carry out the labour on his own. Mr. Irwin testified that Hauserman had used the mobility provisions of article 5.07 in Windsor, London and St. Catharines without incident. In a letter dated August 14, 1979, the witness complained to Mr. R. Reid, the secretary-treasurer of the Ontario Provincial Council, about the conduct of the respondent with respect to article 5.07.



18. Leon Slonimsky, the project manager of Plyform Construction Co. Ltd. ("Plyform"), testified that on September 20, 1978, Plyform and the respondent executed a voluntary recognition agreement. Plyform had contracted to perform a job at the Burlington Water Purification Plant and brought two of its men from Toronto, a general foreman and a foreman. The general foreman was to supervise and work as time allowed and the foreman was to work as a lead hand. Initially there were no problems on the job from the respondent. However, the general contractor on the job requested that Plyform bring in another foreman to increase the supervision. Plyform and the general contractor met with representatives of the respondent. At first the respondent permitted Plyform to have a third foreman on condition that it hire two foremen from the respondent. As envisaged by the respondent, as soon as these two foremen from the respondent were trained the foreman from Toronto would be removed from the job. This meant that for a short period of time Plyform was forced to employ three foremen on the job. The weather conditions became unsuitable for Plyform's work and as a temporary measure two carpenters from the respondent were laid off. On the day following the lay-off Mr. Fenwick spoke to the witness and informed him that carpenters from the respondent had a preference to stay on the job and that the carpenters from Toronto would have to be laid off before the carpenters from the respondent regardless of their capacity. Mr. Fenwick arrived at the job and informed Plyform's foreman from Toronto that he could no longer work there. Plyform complied with Mr. Fenwick's position. At this point Plyform asked the general contractor to arrange a meeting with the respondent because both Plyform and the general contractor believed that Plyform could neither maintain quality nor remain on schedule without adequate supervision. For three days Plyform's crew of carpenters on the job were working without supervision. Then Plyform's superintendent had an argument with one of the respondent's carpenters who was employed by Plyform and who was the shop steward about making personal telephone calls during working time. Shortly thereafter Mr. Tarbutt arrived at the job and asked the superintendent his name and for his permit. Mr. Tarbutt confiscated the superintendent's permit, which had been paid up, and informed superintendent that he could no longer work on the job. Subsequently, there was a meeting between the general contractor, Plyform and the respondent. As a result of this meeting, the respondent was persuaded to return a permit to a foreman from Toronto who had previously been removed from the job. The foreman from Toronto remained on the job until it was completed. All of the other carpenters on the job were provided by the respondent. Plyform's practice was to have crews of between five and seven carpenters. Each crew would have a foreman who would be under the direction of a general foreman. As a result of the supervision which the respondent permitted Plyform to have, Plyform required an additional two to three months to complete the job.

19. Carmine Pattulo testified that he was the president of Avenue Structures which works both as a general contractor and also does form work. Avenue Structures has had a collective agreement with the Carpenter's District Council of Toronto and Vicinity since 1965. On August 28, 1978, Avenue Structures signed a Schedule "C" with the Carpenter's District Council of Toronto and Vicinity. In 1978 Avenue Structures entered into a contract in connection with the construction of the library in the Farmer's Market in Hamilton. The construction of the library was divided into three "packages". The first "package" for the foundation was awarded to an employer whose employees were covered by a collective agreement with the Christian Labour Association of Canada. When the second "package" was about to be awarded to the same employer, Mr. Tarbutt called Mr. Pattulo and asked him to bid a "sharp" or low price and he would not create any problems. Avenue Structures attempted to enter the bidding for the second "package" but was too late and the second



“package” was awarded to the employer whose employees were covered by a collective agreement with the Christian Labour Association of Canada. The third “package” for the superstructure was offered for tender and Avenue Structures submitted a “sharp” bid which was low by three hundred thousand dollars. Avenue Structures was awarded the contract for the third package. Mr. Pattulo then went to the site to talk to Messrs. Tarbutt and Fenwick. Mr. Pattulo informed them he did not want to create any problems and in return Messrs. Tarbutt and Fenwick promised to handpick the carpenters for the work.

20. Avenue Structures supplied the steel, concrete and some excavation and backfilling for the work. Avenue Structures brought the maximum number of employees from Toronto as permitted by article 5.07. These four employees were a superintendent, an assistant superintendent, a working foreman and a carpenter. The witness informed the Board that the respondent in return did staff the job with some competent workers. In January of this year the weather was inclement and the foreman decided to lay off two carpenters. This meant that twenty-two carpenters from the respondent remained on the site. At this point the foreman was informed by the respondent that Avenue Structures had to lay off the out of town employees and that it could not lay off local carpenters.

21. Mr. Patullo then contacted Mr. Tarbutt because he felt that the respondent and Avenue Structures had a gentleman’s agreement. He was hoping to persuade Mr. Tarbutt to change his mind. Mr. Patullo informed the Board that this proved to be a total waste of time and when it came to the time to renew the permit for the carpenter from Toronto the respondent refused to renew it. The next development in the relationship between Avenue Structures and the respondent was in the form of daily visits to the job by Mr. Fenwick. During these visits Mr. Fenwick harassed both the carpenter who did not have a permit and the foreman who had laid off the two carpenters from the respondent.

22. In February of this year, Avenue Structures filed a grievance with the Board under section 112a of the Act. Avenue Structures then decided it would remove from the job the carpenter who did not have a permit. The respondent then insisted that the working foreman from Toronto, Orlando Santos, should be removed from the job. Avenue Structures refused to remove Orlando Santos from the job and withdrew its grievance which had been filed with the Board under section 112a. Finally, Mr. Santos was brought up on charges and was fined two hundred dollars by the respondent.

23. The applicants are asking for a direction that the respondent and its representatives abide by the terms of the mobility clause and damages for the applicants which suffered loss. The applicants argued that the respondent and its representatives had behaved in a high-handed manner and that article 5.07 of the provincial collective agreement was clear on its face. The applicants stressed that a maximum of four people may be transferred into the geographic jurisdiction of the respondent and that there is no mention of a lay-off provision. The applicants pointed out that they had each fulfilled the conditions in article 5.07 in that they had each granted province-wide recognition and that there was no limitation in the article 5.07 to general contractors.

24. The provincial collective agreement is binding on the applicants and the respondent. Each of the applicants has complied with the condition set forth in article 5.07(a). None of the other conditions in the collective agreement modifies article 5.07 in the circumstances of this referral. None of the applicants in any way attempted to circumvent the pro-

visions of article 5.07. Indeed, two of the applicants moved into the geographical jurisdiction of the respondent only after either checking with the respondent about its interpretation of article 5.07 or as a result of a gentleman's agreement which was supposedly to gratify the respondent. Article 5.07(b) clearly sets forth the mobility of manpower and permits only the clear and plain meaning set forth in the table therein. None of the applicants, on the evidence before the Board, at any time either contemplated exceeding or in fact exceeded the provisions and limitations of article 5.07(b). Article 5.07(c) provides that of the first two out-of-area men, one shall be a working foreman and one may be a journeyman or an apprentice. None of the applicants contravened the provisions of article 5.07 and were confronted at every turn by the respondent and its representatives who were determined to nullify its provisions. Article 5.07 is in no way limited in its application to general contractors.

25. The respondent clearly disagrees with the provisions of article 5.07 in so far as these provisions affect its members within its geographic jurisdiction. The applicants for a variety of reasons have preferred to take advantage of the provisions of article 5.07. Such reasons include such legitimate areas of concern as supervision and productivity. The question of the mobility of employees by a unionized employer is not a new issue to collective bargaining in the construction industry. Article 5.07 is an outgrowth of provincial bargaining and appears in the provincial collective agreement. The respondent is not to be permitted to set article 5.07 at naught and is not to be permitted to unilaterally set its own rules within its own geographic jurisdiction. The applicants have suffered monetary losses as a result of the several and repeated violations of article 5.07 by the respondent. The four applicants which have itemized their losses are entitled to compensation from the respondent. The fifth applicant, Avenue Structures, did not claim damages as a result of the respondent's violation of article 5.07.

26. The Board is satisfied that Store Fixtures' job was delayed by one week due to the fact that Mr. Scott was prevented by the respondent from bringing his employees from Toronto to the extent permitted by clause 5.07. The appropriate compensation is the cost of employing three carpenters for one week of forty-hours. The hourly rate of each carpenter is the hourly rate for Hamilton of \$12.67 plus vacation deduction of fifty-one cents an hour, plus holiday pay of seventy-six cents per hour, plus health and welfare and pension benefits of one dollar and forty cents an hour for a total hourly rate of \$15.34. To this figure is to be added the five cents which is the hourly rate of the contribution of Store Fixtures to the Association Administration Fund. The total hourly rate is therefore \$15.39. This figure is to be multiplied by three and by forty in order to take into account one week of forty hours worked by three carpenters. This figure is \$1,846.80.

27. In the case of Chemello, the respondent declined to permit it to bring its employees from Toronto. The Board is satisfied that as a result of this violation of article 5.07 by the respondent Chemello required an additional two weeks to complete its contract using its work force of six men. The appropriate compensation is the total hourly rate for a carpenter in Hamilton of \$15.39 (as computed in the preceding paragraph. This figure is to be multiplied by six and eighty in order to take into account two weeks (or eighty hours) worked by six carpenters. This figure is \$7,387.20.

28. The Board is satisfied that Hauserman's job was delayed as a result of the respondent's violation of article 5.07 by a total of one working day, that is to say, four hours with respect to Mr. Grims and four hours with respect to Mr. Wichaus together with travel time



of one hour each, for a total of five hours each. The hourly rate for Mr. Grims as a lead hand was the rate for the Board's geographic area #8 of \$12.74 plus vacation contribution of fifty-one cents, plus holiday pay of seventy-six cents, plus sixty-two cents for health and welfare, plus seventy cents for pension, plus the employer's contribution of five cents to the Association Administration Fund, plus two cents for dues supplement, plus two cents for Apprenticeship Fund, plus an additional seventy-five cents as the differential for a lead hand. The total hourly rate of Mr. Grims is therefore \$16.17 and the total hourly rate with respect to Mr. Wichaus is therefore the regular rate of \$15.42. Five hours at an hourly rate of \$16.17 together with five hours at an hourly rate of \$15.42 results in an amount of \$157.95.

29. With respect to Plyform, its productivity was reduced by the respondent's violations of article 5.07. Plyform was compelled to reduce its supervision on the site and this resulted in problems with the general contractor. There were sixteen carpenters on the site and if Plyform had been permitted by the respondent to have more supervision it would have hired more carpenters for its crew from the respondent. The respondent's conduct resulted in Plyform having to hire sixteen carpenters for an additional two to three months. The Board determines that the lower figure of two months is the appropriate additional time to consider. Mr. Grossman stated that he was content to have the Board balance off the compensation to Plyform and added that Plyform was not seeking punitive damages. He suggested that fifty per cent of the total compensation as computed by the Board would be a fair sum. The Board agrees that this is an appropriate factor to be applied to the compensation as computed by the Board. The attitude of Plyform is to be commended particularly when considered in the light of the respondent's conduct towards it. The compensation as computed by the Board is the hourly rate for a carpenter in Hamilton as calculated in paragraph 26, that is to say, \$15.39 multiplied by eight weeks at forty hours a week multiplied by sixteen (for the sixteen carpenters). When this amount is computed the Board then applies the aforementioned reduction of fifty per cent to this figure. The adjusted compensation determined by the Board is \$39,398.40.

30. The Board therefore directs the United Brotherhood of Carpenters and Joiners of America, Local 18, to abide by the provisions of article 5.07 of the provincial collective agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America which is effective from September 6, 1978, to April 30, 1980. The Board further directs that the United Brotherhood of Carpenters and Joiners of America, Local 18, pay as compensation the following amounts:

- (a) to Store Fixtures Unlimited Limited the sum of one thousand eight hundred and forty-six dollars and eighty cents (\$1,846.80);
- (b) to Chemello Contractors the sum of seven thousand three hundred and eighty-seven dollars and twenty cents (\$7,387.20);
- (c) to Hauserman Ltd. the sum of one hundred and fifty-seven dollars and ninety-five cents (\$157.95); and
- (d) to Plyform Construction Co. Ltd. the sum of thirty-nine thousand three hundred and ninety-eight dollars and forty cents (\$39,398.40).



**CONCURRING OPINION OF C. A. BALLENTINE:**

1. I concur with the finding of my colleagues in this case, that the respondent union is in violation of the Province-Wide Collective Agreement.
2. I take issue with the amount of damages assessed; however, under no circumstances can I find fault with my colleagues. I do, however, find fault with the respondent union for not having representation at the hearing to rebut the uncontradicted evidence.
3. It is regrettable that the respondent union did not have legal counsel in attendance at the hearing considering the amount of damages claimed by the applicant companies. However, considering that the union agent did appear long enough to request an adjournment, he therefore would have served his constituents better by remaining at the hearing instead of walking out; at least he could have challenged the uncontradicted evidence in the damage claims. I endeavoured to have the applicants justify their extreme claims for damages, but without any challenge from the union there was no basis for me to reject their evidence.
4. After Mr. Fenwick made his request for an adjournment I pointed out to him the purpose of section 112a of the Act and the benefits this section has provided to the construction unions. The paramount advantage to proceeding under this section is speed and the avoidance of delay. The technicalities, delays and costs associated with the grievance and arbitration process in collective agreements often rendered grievances not arbitrable, the expenses prohibitive, and the time taken to resolve a dispute inexcusable. (The Board sets a standard fee of \$100.00 on each party if a section 112a application goes to a hearing and a hearing is held within fourteen days of the filing of the application.) In this last fiscal year, 1977-78, there were 264 references under section 112a, and the settlement rate at the Labour Relations Officer's level, without the necessity of a hearing, was over eighty per cent. To allow adjournments at the hearing at the request of either party, (other than in "circumstances which are completely out of control of the party") would do great damage to the proven beneficial process.
5. Considering the representation of the applicants' evidence and the respondent's counsel's letter to the Board in paragraph 3 of the Board's decision, I am satisfied that this 112a application should never have proceeded to a Board hearing whatsoever, but should have been resolved at the Labour Relations Officer's level or before, which could have probably reduced the astronomical damages (\$48,789.35) being assessed against this local union's treasury.
6. The issue of extended bargaining under the province-wide scheme of collective bargaining for the construction industry has been and is a contentious issue for the unions. "The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America" (the employee bargaining agency) made this a foremost issue in its negotiations and a subsequent strike in 1978 (the first round of province-wide bargaining under Bill 22). It is obvious that Article 507(a) (voluntary agreement for province-wide recognition) of the Provincial Agreement was implemented in lieu of its endeavours to accomplish the province-wide recognition.
7. The applicant companies, with the exception of Store Fixtures Unlimited, (signed

in Oshawa, Ontario) all were pursued and were signed by representatives of the Carpenters District Council of Toronto and Vicinity who held the bargaining rights for the companies in question. It is obvious that the Toronto Council's endeavours were motivated to provide protection for its sister carpenter locals throughout Ontario. Had the applicant companies not signed the Schedule "C" (voluntary recognition) the respondent union in this case would not have had bargaining rights and the companies in fact could have engaged non-union carpenters. It is, therefore, very difficult to comprehend the actions (according to the uncontradicted evidence) of the respondent union's representatives, Messrs. Tarbutt and Fenwick. One could conclude their interpretation of province-wide recognition means *local labour only*.

8. The representatives of the respondent union must be held responsible for their conduct and must stand accountable to the union. Violations of a collective agreement cannot be condoned by either party; to do so would greatly disrupt labour relations and the free collective bargaining process.

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**1126-79-U Local Union 1590 of the International Brotherhood of Electrical Workers, Complainant, v. Bayly Engineering Limited, Respondent.**

**Discharge for Union Activity – Employer laying-off and later terminating active union supporter and member of negotiating committee – Employer advancing business reasons for actions – Whether anti-union motive for company's action**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members C. G. Bourne and O. Hodges.

**APPEARANCES:** *Morley E. Fisher and John King for the complainant; D. I. Wakely, J. McAllister and F. Coones for the respondent.*

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE; November 20, 1979**

• • •

2. The complainant has complained that Eveline Haggarty has been dealt with by the respondent contrary to the provisions of section 58 of *The Labour Relations Act*.

3. The complainant also filed a statement of complaint which states:

**"STATEMENT OF COMPLAINT**

The grievor was temporarily laid off on or about April 18th, 1979, and received letters every two weeks or so advising that she would be returned to work. Follow up letters were received, advising that return to work was postponed for a further two weeks. This continued until she received termination notice on the 20th of July, 1979.

On July 11th, 1979, Local Union 1590 and the Company met at a first meeting in negotiations for a first agreement between the parties.

The grievor had been very active in assisting the Union during the organizing campaign at Bayly Engineering Ltd., and was selected to act on the Negotiating Committee, and was present at the meeting of July 11th. The grievor was on temporary lay off at the time.

The grievor was terminated on or about July 20th, 1979.

The next negotiation session between the parties took place on August 23rd. At this meeting, the Union complained of the termination of the grievor and suggested that the work being done by two new employees hired since her termination could be done by the grievor, who had more than 7 years' service. While the Company would not agree to this, it did agree that it would attempt to find work suitable for Mrs. Haggarty before the next negotiating meeting, which was expected the next week but in fact did not take place for almost two weeks. At this meeting, the Union was informed that the Company had been unable to find work at this time suited to Mrs. Haggarty's skills, in spite of the fact that a further two new employees were hired to do work done previously by the grievor.

The union felt that the termination of the grievor constituted unfair labour practice, and notified the Company that it intended to lay charges under the Ontario Labour Relations Act."

4. In paragraph seven of its complaint the complainant also stated:

"It is the Union's belief that because of Mrs. Haggarty's activities in promoting the Union, and because of a statement made by her in the June 29th issue of the Oshawa Times, the Company terminated her employment and refused to give her available work that she was capable of performing, thereby violating Section 58A of the Ontario Labour Relations Act."

5. The respondent has been in operation since 1944 and is engaged in the business of engineering and producing highly technical electronic communications systems and radar systems. It has a work force of approximately two hundred and fifty employees at its plant in Ajax. During the period of her employment the grievor, Mrs. Haggarty, was classified as a machine operator. During her seven years of service with the respondent the grievor spent most of her time in the machine shop where she was involved in drilling holes, tapping and deburring. In the vast majority of cases the machines with which she worked were set up by lead hands.

6. On April 18, 1979, the grievor was one of eight employees who were laid off. The grievor's layoff was extended during continuous periods and she received notice of these extensions by telegram. On July 12, 1979 she received a final telegram which informed her that her lay-off date had been extended due to continuing lack of work and that a registered let-



ter would follow. On July 12, 1979, Fran Coones, the respondent's personnel manager, sent the following registered letter to Mrs. Haggarty:

"Dear Mrs. Haggarty,

This is to inform you that our Machine Shop Work load continues to be low, with no change in sight. It is there for [sic] with regret that we have to inform you that as of July 20, 1979 per Labour Standards Act Regulations, your employment with Bayly Engineering is terminated.

We enclose 4 weeks severance pay and your holiday pay that you are entitled to as of the above mentioned date.

As the semi skilled position of Machinist 3 is not required else where [sic] in the company it is impossible to relocate you in that category. Future hirings of semi skilled workers may occur and you will be considered for those positions but it should be clearly understood, that as these are not in the Machine shop, the rate of pay will be lower.

Your truly,  
"F. Coones"  
Fran Coones  
Personnel Manager."

7. In addition to the work performed by the grievor in the machine shop, other employees in the machine shop performed skilled jobs such as tool and die making, milling, operated lathes and did surface grinding. These employees possess skills which Mrs. Haggarty does not possess and her work in drilling, tapping and deburring required only two to three weeks of training. She was not able to perform these skilled jobs in the machine shop and, generally speaking, was not able to do the set up for her own work in the machine shop.

8. In March of this year Mrs. Haggarty was briefly employed for two weeks in another section of the respondent's plant when she was engaged in I.B.M. assembly. This job involved the insertion of nuts and screws into an assembly and requires little skill in order to perform it. The grievor was directed into this work because the respondent had received a rush order. In contrast to the assembly of I.B.M. units which requires little skill, the respondent also assembles units know as Printed Circuit Boards (commonly referred to as PCB's) and OZ 1200's. Mrs. Haggarty never worked on either PCB's and OZ 1200's. The evidence establishes that it would require six months training to assemble either PCB's or OZ 1200's for someone without experience in such work.

9. During the months prior to the lay-off of the grievor, the respondent's machine shop had experienced a reduction from nine employees to three employees. The volume of work for the machine shop has substantially decreased and employees in the machine shop who quit their employment have not been replaced and other employees in the machine shop have been laid off by the respondent prior to April 18, 1979. At the time of the grievor's termination the three employees in the machine shop were the supervisor, David McDonald; the lead hand, John Pugh; and Borg Jorgeson, who is a tool and die maker with twenty-eight years of seniority and experience with the respondent. Between April 19 and

September 30, 1979, there was an average of thirty-five minutes each day of the type of work that Mrs. Haggarty could perform in the machine shop. This work has been performed by Mr. Pugh who has also performed more skilled work on each day.

10. Mr. McDonald testified that it was initially decided to lay off the grievor on March 9, 1979, due to a low work load in the machine shop. However, Mr. McDonald responded to a request from Mrs. Haggarty that she be kept on for as long as possible due to her financial difficulties. To this end Mr. McDonald succeeded in extending her employment from March 9 until April 18. He was able to do this by having the grievor produce certain stock orders for future use which were beyond current requirements. In our view he did all that he could do in order to prolong Mrs. Haggarty's employment. In her testimony she stated that she mentioned her financial difficulties to Mr. McDonald only once on April 18 and that accordingly Mr. McDonald could not have scheduled her work with her financial difficulties in mind. We accept Mr. McDonald's evidence on this point in preference to the grievor's evidence. Mr. McDonald's evidence is corroborated in an internal memorandum to his superior, Mr. J. McAllister, dated March 6, 1979, wherein he set forth his plans to retain her as long as possible. The memorandum reads as follows:

"Subject: Eveline Haggarty

As you know, the workload in the Machine Shop has been quite low and some weeks back we decided to lay off Eveline Haggarty as soon as the work in her area came to an end. There are other more highly skilled people in the Machine Shop that can perform their job and hers and are therefore more useful. Per our last discussion it was agreed that E. Haggarty be laid off on Friday, March 9, 1979, for the above reasons but since that discussion E. Haggarty has come to me and requested that she be kept on as long as possible due to financial difficulties and I find that, by rescheduling some jobs, I can keep her on for at least one more week. However, this extension may be difficult to extend in the light of the Machine Shop workload presently being forecast by Production Control. In an attempt to ease the situation, I will try to advise this employee of an impending layoff as far ahead as I can."

11. In July of this year the respondent hired two new employees to perform work on PCB and OZ 1200 assemblies. The respondent was behind schedule in completing these assemblies and hired new employees to join its employees who were already performing this work. These two employees were highly experienced in this type of work. Gary England, the respondent's production supervisor, was able to report to Mr. McAllister that after only two hours of employment they were able to assemble the OZ 1200's. The grievor admits that she is unable to perform work on the PCB and OZ 1200 assemblies. She did not dispute the respondent's evidence that it would take her at least six months to train her to read the circuit diagrams and perform some of the manual work required to make these assemblies. Mrs. Haggarty agreed she could not make these assemblies without training and conceded that the respondent was under no obligation to train her to make these assemblies.

12. The respondent established that the machine shop was low on work and had gradually been reducing its work force in the machine shop. The complainant did not dispute the respondent's position that only an average thirty-five minutes of work which the grievor

could do was performed each day in the machine shop. In addition the complainant was unable to substantiate its claim that persons had been hired to perform work which Mrs. Haggarty could do.

13. Mrs. Haggarty was active in her support of the complainant during its organizing campaign, and was a scrutineer during the representation vote and served on the negotiating committee after certification. In addition Mrs. Haggarty spoke to a reporter from the Oshawa Times. Subsequent to this conversation an article appeared entitled "Workers certified, but still not satisfied" in the edition of this newspaper dated June 29, 1979. Certain statements appear in the article with respect to alleged conduct by the respondent. Certain statements in the article are attributed to Mrs. Haggarty. It is the uncontradicted evidence of Mr. McDonald that he had not seen the article in the Oshawa Times when he made the decision to lay off the grievor. When counsel for the respondent opened negotiations with the complainant he referred to the article and, with the concurrence of the complainant, stated that there would not be any negotiations between them through the press. Mrs. Haggarty informed the Board that the article did not appear as she thought it would and that she would not speak to the press again. The representative of the complainant, Morley Fisher, was embarrassed by the article and did not want to negotiate with the respondent through the medium of the press.

14. While there is evidence of the grievor's activity in support of the complainant, there is no evidence before the Board in this proceeding that her lay-off and termination were motivated by anti-union animus on the part of the respondent. Mrs. Haggarty was provided with work by Mr. McDonald when other employees were laid off. The complainant concedes that the respondent is under no obligation to train the grievor to perform other work. The evidence supports the respondent's position that the grievor was laid off because there was no work which she could do. We find that the respondent looked around for other work which the grievor could perform and was unable to find such work. In addition, the work which she could do in the machine shop has not increased from the level which existed when she was terminated. In our view, Mrs. Haggarty had the misfortune to work in the machine shop at a time when due to miniaturization there was a decline in the orders coming into the machine shop. The grievor and five other employees were laid off from the machine shop or quit and were not replaced. The thirty-five minutes of work each day which she could perform is now performed by another employee who combines this with his other work which is of a more highly skilled nature. There is no evidence before us which would lead to any inference that Mrs. Haggarty was laid off and ultimately terminated for any reason other than lack of work which she could perform with her existing skills.

15. We are satisfied on the basis of the evidence and representations before us in this proceeding that Mrs. Haggarty was neither laid off nor terminated contrary to the provisions of section 58 of the Act. This application is dismissed.

#### **DECISION OF BOARD MEMBER O. HODGES:**

1. The burden of proof under section 79(4a) requires the respondent to establish a case on the balance of probabilities. In other words, it must establish that the more probable of two possible inferences to be drawn from the evidence supports its contention that the dismissal was for a reason unrelated to the presence of the union. Where the evidence is evenly balanced, the burden has not been satisfied. (See *Barrie Examiner* [1975] OLRB Rep. Oct. 745).



2. The Board has long held that in complaints such as this, anti-union motivation does not have to be the sole reason or even the predominant reason giving rise to the alleged unlawful activity for the Board to find the Act has been violated. The Board must “see through” the legitimate reasons which often co-exist with illegitimate reasons for the employer’s conduct in determining if the Act has been violated. The employer cannot engage in anti-union activity under the guise of business reasons. Regardless of the viable non-union reasons which exists, the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive (see *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 294 and 299).

3. The issue in this case is whether the employer Bayly Engineering Limited, has failed to meet the burden of proof imposed by section 79(4a) of *The Labour Relations Act* that they neither laid off nor terminated Mrs. Eveline Haggarty contrary to the provisions of section 58 of the Act.

4. The employer has presented evidence to support its assertion that lack of work was the reason for the lay-off and later termination of Eveline Haggarty. However, there are some questions raised by the evidence called by the respondent regarding first, an alleged conversation with Mrs. Haggarty, and secondly, the quality of her work.

5. The incidents relevant to the lay-off and subsequent termination of the grievor Haggarty were concurrent with the organizing activity of the trade union. Board File No. 2034-78-R is a pre-hearing vote application dated March 9, 1979. The vote was conducted on April 12, 1979. A majority of the votes cast were in favour of the trade union. On June 7, 1979 the Board certified the union.

6. The decision to lay off Haggarty was taken “some weeks back” before the memo dated March 6, 1979, as seen from Exhibit 2, reproduced in paragraph 10 of the majority decision. This typed memo was written by the machine shop supervisor, Dave McDonald, to his superior J. McAllister. “Some weeks back” would be at a time when the grievor Haggarty was actively engaged in signing up members during the union organizing campaign. The grievor testified-in-chief that she actively worked for the union and was signing up members. She thought management knew that.

7. Exhibit 2 is dated March 6, 1979 and states in part:

“... but since that discussion (some weeks back) E. Haggarty has come to me and requested that she be kept on as long as possible due to financial difficulties ...”

This approach by Haggarty to McDonald would clearly have been earlier than March. “Some weeks back” could be no later than early February. The examination-in-chief of the respondent witness Dave McDonald does not establish the time when Haggarty, according to the memo, asked to be “kept on as long as possible”. McDonald testified, “she was advised of lay-off – she asked for assistance – I pulled all controls and got five or six weeks more work for her”.

8. Exhibit 3, a hand-written memo from McDonald to McAllister, is dated April 16:

“Subject Machine Shop Work load.

As you are aware, the work load is very low. Because of this, it will be necessary immediately, to move people out of my department. By tomorrow April 17, 1979, I will have no work for four of my employees. Please advise on what steps are to be taken, in this problem. Listed below are the employees without work.

Eugene Weber

Eveline Haggarty

Hollister Linton

Osley Sybliss

D. McDonald

I've told Dave to advise Mr. Linton that his temporary employment is over (he was hired for 8 weeks & it lasted 15) and to prepare layoff notices for Weber & Haggarty – we will attempt to only lay them off day by day.

J. McAllister

17 April 79.”

9. Exhibit 4, a handwritten memo from McDonald to McAllister, is dated April 17, 1979:

“Subject Temporary lay-off of Eveline Haggarty.

Due to lack of work it will be necessary to lay Eveline off for two days, April 19th and 20th. Eveline is to report back to work, Monday April 23th [sic], for a period of time to be determined by the work load. This day to day layoff will continue until the work load can justify permanent call back.

I have checked with all other areas for job openings, but there is nothing available at this time.

This subject was discussed with Eveline and she is agreeable to this rather than long periods of layoff.

D. McDonald

Advised Mar. 9/79 of layoff and requested delay due to financial reasons – layoff can not [sic] be delayed any longer.

JM” [initialed by J. McAllister]

10. Exhibit 5, a typewritten memo from J. McAllister to E. Haggarty, is dated April 18, 1979:

“Subject Temporary Layoff

Please be advised that, due to a shortage of work which you are well aware of, we are forced to lay you off for Thursday, April 19 and Friday, April 20, 1979. You were first advised of a work shortage and lay-off situation on March 9, 1979, at which time you requested that we attempt to review our action due to serious financial problems in your family and we have been able, by bringing some work through ahead of schedule, to delay that layoff to-date. Every attempt will be made to minimize the amount of layoff time and we will attempt to make it only a few days at a time as the workload permits.

Please report back for work Monday, April 23, 1979 at the commencement of that shift.

J. McAllister

Production Manager”

11. John McAllister was not called to testify. Exhibit 5 establishes an inconsistency with exhibit 2, which is therefore not explained. Exhibit 2 purports to show that sometime between early February and March 6th, Haggarty was aware of the impending lay-off and requested consideration due to financial difficulties. However, by exhibit 5, McAllister advised Haggarty:

“You were first advised of a work shortage and layoff situation on March 9, 1979, at which time you requested that we attempt to review our action due to serious financial problems in your family . . .”

Exhibits 2 and 5 by themselves leave the Board in doubt as to the facts regarding the position taken by the respondent with regard to Haggarty. No testimony was elicited by the respondent’s counsel to clarify the inconsistency apparent on the face of the documents. There is, however, the uncontradicted testimony of Haggarty which confirms my doubt as to the reliability of exhibit 2. Asked by counsel whether exhibit 2 was a true statement of fact, Haggarty said, “no”. Asked if she had ever gone to McDonald and asked to be kept on because of financial difficulty, Haggarty said there had been no *discussion* about lay-off before. The further evidence of Haggarty in chief is that her first indication of lay-off was given by McDonald in a conversation with her on the Wednesday before the lay-off. On that day, April 18, 1979, McDonald called her into his office and asked if she was aware of the shortage of work. She said, “yes”. McDonald then asked would she be agreeable to take two days off. Again she said “yes”, and added that she could not afford a long term lay-off because she was the only one in the house working. Mrs. Haggarty testified that that was the only conversation. Exhibit 4, dated April 17, 1979 from McDonald to McAllister, carries a notation initialed by J. McAllister:

“Advised Mar. 9/79 of layoff and requested delay due to financial reasons – layoff can not [sic] be delayed any longer.”

This notation appears to be a note by McAllister to himself. However, exhibit 2, dated



March 6, 1979, purports to establish an earlier discussion between McDonald and McAllister, when the decision was first said to be taken to lay-off Haggarty on Friday, March 9, 1979. It is arguable that McAllister would not have written the notation to himself on the bottom of the memo of April 17, 1979 if the discussion referred to in Exhibit 2 had actually taken place. This casts further doubt upon the credibility of McDonald as the author of exhibit 2, and raises some doubt as to time when exhibit 2 was composed and typed.

12. The respondent contended that Haggarty could not be transferred to PCB or OZ 1200 assembly because of her inability to perform highly skilled operations. The respondent did transfer Haggarty to IBM sub-assembly, an operation demanding less skill than PCB or OZ 1200. The circumstances of this transfer and the reasons for it are not clear. In this regard the respondent called Garry England, production supervisor in charge of IBM sub-assembly, printed circuit board assembly (PCB) and OZ 1200.

13. England testified that Haggarty worked for him for two weeks in the first part of March. He was approached by Dave McDonald, the machine shop foreman, and asked whether he could place anyone; England had absenteeism and therefore Haggarty was transferred to IBM sub-assembly. The uncontradicted testimony of Haggarty concerning the transfer is quite different. Dave McDonald came to her one morning and said she had to go up to the IBM department. Because she was not half way through a week-long job in the machine shop, she asked McDonald why she had to go to the IBM department. McDonald said something about a rush job. Haggarty asked McDonald what possible use could she be in the IBM on a rush job, when she had never worked there before. McDonald shrugged and said, "I only did what I was told". The Board is left in doubt as to who told McDonald what to do in this instance, since no evidence was called in reply.

14. England testified-in-chief that Haggarty had a very poor standard of performance – an efficiency rating of 50-70% in the first week and 30% in the second week. He said there was an attainable production rate per day established for IBM. England in cross-examination admitted that to achieve IBM efficiency could take up to a month, and that he did not expect 100% in the first week from a new employee, or even 70%. He indicated one person does not do the assembly completely.

15. The evidence-in-chief of Haggarty with regard to her performance assessment by England, is that she "never saw England the whole two weeks". Mrs. Paul, who was her supervisor in IBM, did not advise her of any alleged poor performance, nor did anyone else. Mrs. Haggarty explained, however, that in her second week she had surgery and the stitches made her uncomfortable and slowed movements, but there was no change in her work. She testified that she had no reason to believe her work output was less than the others with whom she worked. She said there had been no complaints made to her in the seven years of her employment. Questioned in cross-examination, Haggarty was unshaken in her testimony concerning her performance, saying, "I did not know that I was not keeping up".

16. Mrs. Janet Rose Gertz, an employee for three years and working in IBM since August 1979, was called by the complainant. Gertz testified that in the IBM she was able to keep up almost immediately. Employees work together in pairs, each doing an operation. Little dexterity is required. She had worked with Haggarty on the line "for three weeks". Gertz testified that the skill of Haggarty was like the rest on the assembly line. They did 72 a day "Haggarty was no hold up to us". Cross-examined, Gertz said that she herself had done

PCB assembly in a day as soon as she started. Asked if she had been experienced, Gertz replied that she had been experienced as a waitress.

17. The aspects of the evidence discussed above give the impression that the employer was trying too zealously to create a favourable impression of its own efforts and correspondingly an unfavourable impression of the grievor. This peculiarity, even where there is no evidence of a pattern of anti-union behaviour, raises a question as to the employer's motivation which has not been satisfactorily explained. The circumstances of Mrs. Haggarty's seven years of service, her active work for the union, including scrutineering at the certification vote and being a member of the negotiating committee, her statement to the press, and the fact that she was discharged nine days after the first negotiating meeting, are to be weighed against the evidence of lack of work and the fact that her termination after thirteen weeks lay-off is in accordance with section 40 of *The Employment Standard Act*. The evidence does not point to a clear conclusion. Therefore, the employer has failed to meet the burden of proof imposed by section 79(4a) of *The Labour Relations Act*; that is, that Mrs. Eveline Haggarty was neither laid off nor terminated contrary to the provisions of section 58 of the Act. Indeed, even if the evidence were evenly balanced, the employer could not be found to have discharged the burden of proof. In this case I find an anti-union animus in activating the respondent employer.

18. Considering all of the evidence, it is my decision that Mrs. E. Haggarty be re-hired and that she be reimbursed in full for all wages and benefits since the date of her lay-off until the time she is re-employed by the respondent in a job suited to her skill and experience.

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**0224-79-R** Ontario Taxi Association Local 1688 Canadian Labour Congress, Applicant, v. **Blue Line Taxi Co. Limited**, Respondent.

**Certification – Employee – Whether taxi drivers and owners dependent contractors – Whether owning more than one taxi or occasionally hiring replacements affecting dependent contractor status.**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members M. J. Fenwick and E. C. Went.

**APPEARANCES:** James Hayes, Shalom Schachter and Jack McDowell for the applicant; E. Rovet and Wayne French for the respondent.

**DECISION OF THE BOARD;** November 28, 1979

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2. This is an application for certification in which the respondent takes the position that the persons affected are not employees within the meaning of Section 1(1) (gb) of *The Labour Relations Act*.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

4. The Board has been assisted in this application by the parties presenting an Agreed Statement of Facts from which the Board will make its findings on the threshold question. The text of the Agreed Statement of Facts is as follows:

“A) BUSINESS OF RESPONDENT

1. The Respondent is engaged in the taxi business in the Ottawa region. Exclusive of its airport service, it operates a fleet of 350 vehicles of which 290 are owned and operated by individual owners.

2. The Township of Gloucester is part of the Regional Municipality of Ottawa-Carleton. Gloucester has a population of 91,000 people. Gloucester has available a maximum of 400 taxi-owner licenses. There are currently 150 taxi-owners licenced by Gloucester. Ninety-two of these 150 taxi-owners operate within the Airport service provided by the Respondent, details of which are provided below. Apart from the Respondent, the only other taxi companies operating in Gloucester are Cyrville Taxi for which about ten or fifteen drivers work, Capital Taxi and Beacon-Vanier Taxi.

3. The Respondent operates an airport bus and taxi service to and from Ottawa International Airport which is located in the Township of Gloucester. The Respondent, under the authority granted to it by the Federal Ministry of Transport, has the exclusive right to provide ground transportation for hire from the airport. Any other taxi company or bus company, including Murray-Hill, Voyageur-Colonial, and Travelways may bring passengers to the airport. The bus companies on occasion pick up groups at the airport on a charter basis or at the request of an airline. Any taxi-cab can pick up a passenger at the airport when requested. The Regional Transit Company, OC Transpo, runs a regular bus service to and from the airport. Generally speaking only a taxi operating under the Blue Line sign can pick up at the airport unless the other taxi-cab is specifically requested to do so. R.C.M.P. personnel are present to protect the rights of the Respondent, and from time to time have inquired from non Blue Line Drivers the propriety of their presence at the airport.

4. To carry out its airport service the Respondent has made the following provisions:

- (a) it maintains and operates a fleet of buses to transport passengers from the Airport to hotel destinations in downtown Ottawa and return;
- (b) it utilizes taxis licenced by the City of Ottawa and operating as part of its fleet to transport passengers to the Airport from points within the City of Ottawa and vice-versa;



- (c) approximately 92 vehicles owned and operated by drivers licenced by the Township of Gloucester are utilized to transport passengers from the Airport to points within the City of Ottawa and on occasion to transport passengers from points within the Town of Gloucester to the Airport.

This application for certification concerns only individuals functioning in category (c) above.

## B) LICENCING

5. The drivers composing the Bargaining Unit as claimed by the Applicant are all licenced under a by-law of the Township of Gloucester relating to taxi licencing and the majority are licenced as taxi-cab owners, the remainder as taxi-cab drivers for that Township. Inquiries are made by the licencing authority as to which company the driver will be "employed by". This is the standard and sole format used by the township for identification purposes. Police authorities issue a card with the name Blue Line embossed upon it.

6. The Respondent does not in any way assist individuals in obtaining taxi licences and makes no representations with respect to tariffs and taxi fares. These are set exclusively by the Township of Gloucester. A representative of the Respondent, Mr. Montgomery has informed drivers of the procedure to make such a representation after rates had been increased in Ottawa. There is a mutual interest in having Gloucester rates equal to those in Ottawa. Furthermore after taxi rates are increased in Gloucester the Respondent increases the Stand Rent referred to in paragraph 10.

7. Drivers are subject to compliance with certain rules and regulations as laid down under the Township of Gloucester licencing by-law a copy of which is attached as Schedule "A". These regulations *inter alia* relate to vehicle appearance and driver appearance. They are responsible to the supervision of the Township of Gloucester Licencing Enforcement Authorities, in this case the Township of Gloucester Police Department.

## C) AIRPORT TAXI REGULATION

8. The Gloucester Blue Line drivers operate out of Ottawa International Airport on the following basis:

They enter the taxi parking line at Ottawa International Airport and pick-up a fare when a passenger comes out of the Airport, deliver their fare to their destination (usually within the limits of the City of Ottawa) and return to the Airport to line up again for another fare. The return run to Ottawa International Airport is generally with an empty taxi as the City of Ottawa has a by-law which prohibits these individuals from

soliciting return fares to the Airport. The City of Ottawa also has a by-law which prohibits them from picking up a fare in the City of Ottawa and dropping the fare off within the City of Ottawa. The only dispatch calls which the Respondent is legally entitled to award to an individual licenced under the Township of Gloucester by-law is a call which either originates in the Township of Gloucester or which will be terminating in the Township of Gloucester, calls which originate in another township or city, except Ottawa, and terminate in another township or city. When calls are dispatched within the City of Ottawa there can be no certainty as to the ultimate destination, and accordingly the Respondent will only dispatch to Gloucester drivers' calls received which originate in the Township of Gloucester, and vice versa and calls received in Townships other than the City of Ottawa.

9. The Respondent maintains an agent at Ottawa International Airport who, apart from providing ground transportation information to passengers, regulates the flow of passengers onto buses and regulates the tax-cab lineup. He takes a daily head count of bus passengers and the number of taxis dispatched from the Airport with fares, which is reported to the Ministry of Transport. In most part the taxi-lineup is self-regulating and the car at the foremost end of the line is required to take the first available passenger, and the passenger is required to take the first taxi in the line up.

#### D) FINANCIAL ARRANGEMENTS

10. The drivers pay a flat monthly stand rental to the Respondent of \$150.00 and are entitled to pick up fares from the Ottawa International Airport. Some drivers also make use on a limited basis of the taxi dispatch system operated by the Respondent and for this they pay an additional \$20.00 per month. Failure to pay the monthly stand rent will disentitle an individual to work on behalf of Blue Line in any capacity.

11. The drivers do not receive wages payable by the Respondent. Their remuneration is the fares paid to them by passengers carried in their vehicles. The only standard financial arrangement between the Respondent and the drivers is the stand rent charge referred to above.

12. Drivers are at risk for the non-payment of fares. If a charge slip is used by a Blue Line account customer, the full amount is reimbursed to the driver by the Respondent. The Respondent is at risk for the non-payment of charge accounts. Drivers are obliged to accept charge slips as payment. Attached as schedule "B" appears a copy of a charge slip.

13. The Respondent does not now make any payments under the Unemployment Insurance program or Canada Pension in respect of the drivers. The Respondent makes no deductions or remissions to Revenue Canada for personal income tax of the drivers and each driver is responsible for the calculations and payment of his own income tax.

14. All of the drivers are responsible for provisions of their own taxi-cab vehicle and all necessary equipment including roof sign, taxi-meter and two-way radio where they make use of the Respondent's dispatch system. This equipment may be rented from the Respondent but there is no requirement to do so except for the roof sign and they are available elsewhere. Radio are available for \$20.00 per month and Blue Line has access to a radio frequency. Roof signs which bear the Blue Line name are obtainable from the company upon deposit of \$50.00. If the sign is damaged there will be a deduction from the \$50.00 deposit. The sign must be returned and may not be used if stand rent is in arrears.

15. There are no compulsory "tie-ins" between the Respondent and the individuals similar to requirements which exist in other centres with respect to the purchase of gasoline, insurance, taxi-vehicle, taxi equipment, etc. Repairs on taxis are offered by the Respondent and gasoline is sold at the retail rate available to the public. Posted in the Respondent's premises is a notice stating "if you are interested in a new car see the fleet manager at Meyers Motors". This notice and similar notices have been posted on request from dealerships in order to ensure that commissions on purchases are paid to the Fleet Manager.

16. The drivers carry receipts with the Blue Line logo for purposes of providing receipts for passengers. They may also carry and hand out their own business cards which they obtain and pay for themselves. Business cards bear the Blue Line logo. Aside from the cards, drivers do no other advertising whatsoever.

17. The Respondent does provide a group insurance policy for all drivers operating under the Blue Line sign which provides public liability coverage of \$1,000,000.00 as opposed to the \$200,000.00 minimum coverage required by the Township of Gloucester. Blue Line requires at least the minimum coverage required by the Township of Gloucester. The drivers are not required to obtain coverage under the Blue Line group insurance scheme, but can obtain insurance elsewhere. At the present time approximately 55 out of 92 drivers utilize the Respondent's insurance scheme. All other drivers restrict in advance the scope of their operations to the airport run, thereby being eligible for the airport limousine insurance rate which is obtained at a 40% or \$500.00 premium saving. Only one insurance company, Travellers Indemnity Company of Canada offers this lower premium. The drivers are responsible for arranging their own insurance coverage as required under the Township of Gloucester licencing by-laws and are responsible for all other expenses incurred by them including all licence fees and operational expenses. Under the Blue Line group insurance scheme drivers may pay the premium on a yearly or semi-yearly basis or on a monthly basis. In the event they choose to pay on a monthly basis the premium will be higher than if paid on a yearly or semi-yearly basis.



## E) REGULATION OF WORKING CONDITIONS

18. The drivers are required to abide by rules and regulations which are formulated either by the Township of Gloucester pursuant to its taxi by-law, the Ministry of Transport or the Respondent.

- (a) the Township of Gloucester by-law provides for dress requirements, prohibits unduly long hair, sideburns and moustaches, prohibits the wearing of jeans, t-shirts, sandals and sneakers. The Respondent has asked drivers to wear a tie between the months of September and June.
- (b) the Township of Gloucester by-law requires that automobiles be kept clean;
- (c) the Ministry of Transport, through the Airport Manager at Ottawa International Airport, prohibits the solicitation of passengers apparently waiting for or proceeding to airport buses operated by the Respondent.
- (d) the Respondent requires that the taxis be painted entirely black except where a car has a vinyl roof. There will be no pin-stripping (paint strips on the black colour). The Township of Gloucester in its by-law requires that a taxi have a rug in the trunk and mats on the floors, there shall be no pictures (family, etc.) in the car and that ornaments not be hung from mirrors;
- (e) with respect to charge accounts, drivers are obliged to accept charge slips and the Respondent discourages the transfer of charges between drivers, although this policy is difficult to enforce. The Respondent provides each driver with a yearly schedule indicating when monthly stand rents are due and when charges are to be redeemed. Charges can be redeemed five days a week before 12:00 p.m. noon and the schedule provides that at a minimum they be redeemed on the 16th and 30th of each month;
- (f) vacations: drivers are required to return their roof sign and licence plate to the Respondent when they take a vacation for the following purposes:
  - 1) To prevent drivers cheating;
  - 2) To assure to the Respondent control to approve replacement drivers.
- (g) airport lineup: the Ministry of Transport, as well as the Respondent prohibit any driver from "jumping" the line or refusing the the first properly available passenger if he or she represents a short fare. If a driver chooses to leave the lineup for lunch or some other

reason, then of course he must return to the end of the lineup. His space will not be held for him;

- (h) stand rents: stand rents are payable on the first day of each month, but there is an additional three-day grace period. In the event stand rents are paid late on a continuous or recurring basis then at its discretion the Respondent will demand an additional amount by reason of late payment. In the event a driver is unable to work there is no automatic rebate but the Respondent in its discretion, for reasons acceptable to it, will rebate that portion of the rent for time not worked. If the stand rent is not paid after a period of grace has been extended, then the particular cab will be booked out.

19. All rules referred to above from whatever source are from time to time enforced either by the Respondent's Airport Agent or by senior officers of the Respondent. The Company may also from time to time impose a penalty for certain infractions which may be in the form of a fine up to \$100.00. The most serious infraction for which the penalty is exacted is when a taxi driver picks up bus passengers at a hotel, runs the passenger to the airport without turning on his meter and charges the bus rate. A driver may be required to return to the end of the airport line-up and he may be "booked off" (suspended) for variable periods of time. Where drivers refuse fares they are automatically sent to the end of the line and are either fined or suspended. The Respondent has from time to time terminated its relationship with drivers.

#### F) OTHER ARRANGEMENTS OR FACTORS

20. There is no written agreement between the Respondent and any of the drivers within the Bargaining Unit claimed by the Applicant to be appropriate. The Respondent keeps on file certain basic information with respect to each of these individuals such as name, address, telephone number, licence number, etc. Attached hereto and marked as Schedule "C" is a form utilized for this purpose. If a driver wishes to participate in the Blue Line group insurance scheme he will apply in writing and a copy of this application for insurance is given to the insurance manager of the Respondent. In addition for drivers directly employed by it the Respondent does have an application form, but this form has never been completed by any of the individuals within the proposed Bargaining Unit.

21. The only identifying features indicating to the public any relationship between the drivers and the Respondent are a standard roof sign which they carry on their vehicle bearing the logo "Blue Line", as well as the black colour of the taxi vehicle. Neither the telephone number of the Respondent nor any other identifying factors are affixed to the vehicles used by the individual owners. There is a card in each taxi with a picture of the driver which identifies him as "employed by" Blue Line

Taxi. This is a card provided by the Township of Gloucester and is the sole format used by the township. A copy of this card is attached as Schedule "D".

22. A number of the drivers claimed by the Applicant own more than one vehicle. It is estimated that approximately three (3) own more than one vehicle and in addition about ten (10) engaged substitute or replacement drivers.

23. Each driver is at liberty to rent out his vehicle to other individuals if he so chooses and no control is imposed by the Respondent. However, the right to work under the Blue Line sign or service the Airport is personal to the individual and these rights are not freely transferrable. Blue Line reserves the right to approve any replacement driver working under the Blue Line sign or servicing the airport, (and see further paragraph 24 below). If the driver is participating in the Blue Line group insurance scheme and wishes to employ another driver then additional insurance is required under the policy.

24. Each driver is at liberty to use his taxi-cab for other taxi fares within the Township of Gloucester as he sees fit. However, the methods that may be used are prescribed by the by-laws of the Township previously referred to and attached as Schedule "A".

25. The drivers control their own hours of operation and determine for themselves the number of hours that they choose to work. The Respondent permits this because the large number of drivers and the natural balancing of individual decisions, results in satisfactory servicing of the airport and the township. They are not required to be at the Airport at any specific time or to work for any number of hours or to leave at a specific hour. They are not required to check in with the Respondent's radio dispatch system when they arrive at work, nor are they required to check out when they leave. However, when they arrive at the airport they automatically check into the line up.

26. Drivers take holidays, days off and vacations at their individual discretion. If they plan to take an extended holiday encompassing a number of months they are required to inform the Respondent in order that suitable arrangements may be made to have a replacement service the Airport. (see also para. 18(e) above)

#### G) DRIVERS

27. The drivers state that their personal income is derived entirely or almost entirely from their association with the Blue Line Taxi airport service."

5. The Board appointed an Examiner to further enquire into the matters set out in paragraph 22 above and the parties entered into a Supplement to the Agreed Statement of



Fact covering those matters referred to the Examiner whose appointment is now terminated. The Supplement to the Agreed Statement of Fact reads as follows:

- “1. There are five drivers who own more than one vehicle. Four drivers (Roger Bourgon, C. Jazzar, D. Zarka, J. Mahfouz) who own two cars and one driver (J. MacLean) owns three cars. Persons operating vehicles owned by someone else pay rent to the owner for use of the vehicle. The owner in turn pays stand rent to Blue Line Taxi Company. All drivers receive their compensation as set out in the agreed statement by means of metered fares.
2. Ten drivers permit other persons to operate their vehicles on an occasional basis. Typically this would involve the gratuitous use of the car by a relative during off peak hours (nights, weekends and holidays). The frequency of this would depend entirely upon the discretion of the owner of the vehicle. The replacement receives all the compensation from the taxi customer's fare and covers his share of running expenses i.e. gasoline and oil. It is not possible to state that there is a general practice in this connection. A driver may permit someone else to use his car on one occasion. Another may do so on irregular occasions.
3. As is stated in Paragraph 23 of the agreed statement, no driver of any kind may operate a vehicle under the Blue Line sign unless he has been approved by the Respondent and the Respondent is satisfied that he carries adequate additional insurance coverage.
4. All drivers under the Blue Line sign, whether or not they be casual replacement drivers operating a vehicle owned by someone else are subject to the same rules and regulations referred to in the agreed statement which are enforced by the Respondent and/or Township authorities. Replacement drivers may be removed by the owner of the vehicle also but this would only occur if the owner believed his car was being damaged.
5. The schedules provided by the Respondent at this application do not include persons who have been casual replacements or drive the car owned by someone else.
6. In view of the above agreed statement of fact the parties hereby agreed to waive the formal examination and report and any requirement for any further hearing.”

6. Section 1(1) (ga) of the Act reads,

“‘dependent contractor’ means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or

reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.”

The interpretation of this section of the Act, introduced in 1976, has been comprehensively examined by the Board in a number of recent decisions as referred to in the as yet unreported case of *Western Dispatch Inc. operating as Western Dispatch Company*, Board file 1396-78-R, at paragraph 9 thereof. As a result, the principles to be applied to given factual situations such as this are well-established. As was said in the *Superior Sand, Gravel & Supplies Ltd.* case [1978] OLRB Rep. Feb. 119:

“The type of economic dependence and the kind of business relationship existing in any given case are the primary indicators of whether a person is a dependent contractor. These indicators must be applied in a comparative manner, the fundamental question always being whether the person’s relationship with another more closely resembles the relationship of an employee than that of an independent contractor . . .”

7. The facts in the instant case establish that the owner-drivers are dependent upon the respondent for the flow of their work opportunities. The respondent’s entrepreneurial activity in acquiring an exclusive right to provide ground services from the airport creates the work opportunities for the owner-drivers. That there is a type of economic dependency on the respondent for such work opportunities is obvious in respect to the 37 owner-drivers who have restricted their activities solely to the airport run and therefore derive their total income from this source, and in respect to the remaining owner-drivers, it is agreed that their personal income is almost entirely derived from this service. All owner-drivers by virtue of their Township of Gloucester license have the capability of utilizing their vehicles for other taxi fares within the Township, in accordance with whatever restrictions are generally applicable in conformity with the Township by-law. The evidence of the exploitation of this market by the owner-drivers, in view of their agreed source of personal income is of a minimal nature, and there is no evidence of any entrepreneurial activity by drivers in this respect.

8. It is argued that despite the flow of work opportunities being through the respondent that no compensation or reward flows directly from the respondent to the owner-drivers but rather that all revenues flow from third-party passengers and the owner-drivers are totally at risk for the collection of such; and that this factor distinguishes the instant case from previous cases considered by the Board where the responsibility of revenue collection from third parties was assumed by the respondent and payments flowed directly from the respondent to the owner-driver. In our view this single factor cannot be allowed to obscure the fact that the control of work opportunities by the respondent is of, and in itself, the *sine qua non* of the economic dependence which here exists, and the form of compensating for the service performed is determined by the type of market being served. This form of compensation, combined with the stand rental flowing back to the respondent, must be viewed in the total context of the taxi industry, and is not sufficient to make the driver more closely resemble an independent contractor than an employee.

9. It is also argued that the respondent plays no role in setting a fare rate structure

which is determinative of the owner-driver's income. This is a matter which depends solely on the decision of the Township of Gloucester and the respondent, aside from having informed drivers of the procedure to be followed, plays no role in owner-driver representations to the Township. It is agreed that following a taxi rate increase by the Township, the respondent makes some increase in the Stand Rent which is currently \$150.00 per month. There is no evidence before the Board as to whether these tandem adjustments have assumed any particular pattern and there is no evidence before the Board that an adjustment in stand rental is precluded other than following an increase in taxi rates. In any event the driver's income is not solely within his control and ability to persuade the Township to alter fare structures. That is only one part of the equation and the other equally important factor is the respondent's capability to unilaterally adjust the stand rental fee.

10. The Board is satisfied that the owner-drivers are economically dependent on the respondent. It remains for the Board to further examine the kind of business relationship which exists between the owner-drivers and the respondent in order to determine whether they more closely resemble those of an employee or of an independent contractor.

11. The ownership of vehicles and accompanying responsibility for licenses, insurance, etc. as here exists, is not in itself a circumstance which precludes a person being a dependent contractor under the Act.

12. The owner-drivers here are not required to work any prescribed days or hours and are under no obligation to advise the respondent of their availability for work or otherwise (save for an extended vacation absence). The agreed statement of facts states that this is permitted by the respondent "because the large number of drivers and the natural balancing of individual decisions, results in satisfactory servicing of the airport and the township". In some degree it may be analogized to "flex-time" programs existing in other employment relationships and is similar to working conditions in the *Flintkote Company of Canada Ltd.* case [1978] OLRB Rep. Sept. 822 where the Board did not consider that such lack of direct control and supervision caused such persons to more closely resemble independent contractors than employees.

13. The evidence establishes that the respondent does enforce, accompanied by penalty, all rules and requirements emanating from the Township of Gloucester, the Ministry of Transport or itself. Penalties imposed by the respondent vary from requiring a driver to return to the end of the airport line, to variable suspensions or fines (ranging up to \$100). Additionally the respondent has from time to time terminated its relationship with drivers. Such controls demonstrate the importance which the respondent places on protecting its own business relationship vis-a-vis the Ministry of Transport and the Township of Gloucester and doing so in a manner more closely resembling controls applicable to employees than to independent contractors.

14. Also it is noted that while owner-drivers are free to employ a replacement driver or rent their vehicle, such replacement driver if he is to participate in the airport work opportunities requires the approval of the respondent. The right of working in the airport service is thus personal to the individual and this is a condition more closely resembling an employee relationship than that of an independent contractor.

15. Counsel for the respondent refers us to the *Seven-Eleven Taxi Ltd.* case [1976]



OLRB Rep. April 134 and argues that the facts in the instant case should similarly result in a finding that these owner-drivers are independent contractors. It is not determinable from a reading of that decision that the facts of that case were on all fours. In particular, it is not apparent that the respondent there exercised any control over a replacement or substitute driver, or prescribed any rules to be complied with by drivers over and beyond those imposed by the Municipality, or assumed any responsibility for enforcement of Municipal requirements other than in the instance of "refusal of a fare", or that "all or nearly all" of the driver's income in that case related to the arrangement between the driver and the supplier of the air service. This difference in factual situations, in our view precludes this Board from arriving at the same factual conclusions as did the Board in that case.

16. We therefore find that the owner-drivers, other than those referred to in the Supplement to the Agreed Statement of Fact, are dependent contractors within the meaning of Section 1(1)(ga) of the Act. In respect to the owner-drivers described in the Supplement to the Agreed Statement of Fact the Board, in considering their status insofar as this application is concerned has reference to the *Canada Crushed Stone* case [1977] OLRB Rep. Dec. 806 where the Board at 813 said,

"... A dependent contractor with the authority to hire, fire, discipline and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of *The Labour Relations Act*. If, however, it is found that a dependent contractor does not possess this type of authority, then, notwithstanding the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under *The Labour Relations Act*."

17. Turning our attention to these person who rent vehicles from owners who pay stand rent to the respondent, the Board notes that access to the available work opportunities by persons operating vehicles owned by someone else is controlled by the owner of the vehicle who is in a contractual relationship with the respondent through the payment of stand rental. These "vehicle renters" by virtue of the agreement between the respondent and the owner must be approved by the respondent but their access to work opportunities flows from the arrangement between themselves and the owner of the vehicle and there is no privity between the "vehicle renters" and the respondent. Such "vehicle renters" cannot therefore fall within the scope of the present application.

18. In respect to the five drivers who own more than one vehicle and pay to the respondent stand rent in respect to all vehicles owned, and in turn rent vehicles to others it is our conclusion that they more closely resemble independent contractors than employees and as such are not entitled to the benefits and protection of the Act. While the Board does not have before it evidence enabling it to determine the exact nature of the relationship between the owners of vehicles and the renters of such, it is clear that the owner is engaging in an entrepreneurial activity in which he earns a profit on the labours of others in respect to work opportunities to which he controls access, and owns the tools of production which are necessary to take advantage of those work opportunities, and these factors in themselves cause him to more closely resemble an independent contractor than an employee.

19. In respect to the ten drivers who "permit other persons to operate their vehicles on an occasional basis" it does not appear to us that such loosely structured and relatively in-

frequent arrangements detract from the fundamental nature of the relationship between such persons and the respondent. We find such ten drivers to be dependent contractors within the meaning of Section 1(1)(ga) of the Act and therefore employees within the meaning of Section 1(1)(gb) of the Act.

20. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent licensed as taxi drivers by the Township of Gloucester, constitute a unit of employees of the respondent appropriate for collective bargaining.

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22. A certificate will issue to the applicant.

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**1155-79-R** The Association of Charter, Tour and Allied Drivers (Kitchener Division), Applicant, v. **Charterways Transportation Limited**, Respondent.

**Certification – Practice and Procedure – Last payment to applicant made more than 6 months but less than one year prior to application – Board ordering vote**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members C. A. Ballentine and J. A. Ronson

**APPEARANCES:** *James Robert Warren and John McAra for the applicant; Barbara Crosby for the respondent.*

**DECISION OF THE BOARD;** November 5, 1979

1. This is an application for certification.

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4. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 25th September, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. The membership evidence filed by the applicant indicates that the last monetary payment to the applicant by any employee in the bargaining unit was made in January of 1979, that is more than six months but less than a year prior to the application date. The Board's long standing practice in such situations is to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. See: *W.N. Construction (Ottawa) Ltd.*, [1968] OLRB Rep. Sept. 645. We are not satisfied that the circumstances of this case warrant a departure from this practice.

6. The Board hereby directs the taking of a representation vote.

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8. The matter is referred to the Registrar.
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**1320-79-R** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **C.I.P. Victoria Ltd.**, Respondent, v. Group of Employees, Objectors.

**Certification – Petition – Practice and Procedure – Form 5 posted less than 2 days prior to expiry of terminal date – Employee objector seeking terminal date extension for filing petition – Board extending terminal date – Whether petition voluntary expression of employees' wishes**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members W. F. Rutherford and E. C. Went.

**APPEARANCES:** *Ken Petryshen for the applicant; Ross Dunsmore and M. Leveck for the respondent; Richard I. Haley for the objectors.*

**DECISION OF THE BOARD;** November 8, 1979

1. This is an application for certification.

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5. Mr. Richard I. Haley, an employee in the above described bargaining unit, appeared at the hearing in this matter and requested an extension of the terminal date. He explained, and we are satisfied, that the notice of hearing in this matter was not posted until 4:00 p.m. on October 16, 1979 when the terminal date was set for October 18, 1979. He along with another employee was responsible for circulating a statement in opposition to the trade union which was hand delivered to the Board at noon on October 19, 1979, the day following the terminal date, but was refused by the Board because the terminal date had already passed. Mr. Haley argued that the notice period was insufficient to allow the expression of opposition in the form required by the Board and asked the Board to extend the terminal date in order to permit acceptance of the statement of desire. The Board contrasted this case with the recent *MacDonnell Memorial Hospital*, Board File No. 1189-79-R, dated October 25, 1979 in which the notice was posted at 11:00 a.m., two days before the terminal date. In that case no employees appeared before the Board and the Board rejected the submission of the employer that the terminal date should be extended. In this case the notice period was one half day shorter and an employee directly affected appeared to argue that he had been adversely affected. The Board is satisfied on his representations that he was adversely affected by the short notice period and hereby confirms its oral ruling at the hearing to extend the terminal date to October 30, 1979, the date of hearing, in order to permit the statement of desire to be filed.



6. The Board examined the statement of desire and satisfied itself that it carried a sufficient number of signatures of those who also signed union membership cards as would cause the Board to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote if satisfied that it represented a voluntary expression of those who signed it.

7. Mr. Haley gave evidence in support of the statement of desire. His evidence discloses that upon seeing the notice of application he asked his foreman what he could do to oppose the trade union. He made the request in the presence of another bargaining unit employee. The foreman directed Mr. Haley to the notice and by his evidence he read the notice very carefully so that he understood the petition process. In conjunction with a bargaining unit colleague he drafted a hand-written preamble in the foreman's office. He testified that the foreman was not in the office at the time but admitted that the office had a window to the warehouse. His colleague, who did not appear to testify, had the preamble typed. Mr. Haley, who had no first hand evidence as to who typed the document or under what circumstances, testified that he understood that it had been typed in the company's office by the receptionist. Mr. Haley gave first hand evidence of the circumstances under which the first six signatures were obtained. The evidence establishes that these signatures were obtained on company premises during working hours on October 18. Mr. Haley testified that the foreman was not present. Mr. Haley was under the belief that the Mississauga warehouse was affected by the application for certification. He travelled to Mississauga as part of his regular duties on October 19th and took the opportunity to address the employees there. He admitted that the supervisor of the Mississauga Warehouse was present when he spoke to the Mississauga employees. The Mississauga supervisor advised that the application did not affect that location. Mr. Haley then arranged to have a company salesman deliver the statement in a sealed envelope to his colleague at the Company's Toronto warehouse. Mr. Haley could give no first hand evidence concerning the obtaining of the last three signatures on the statement or its transportation to the Board on October 19th. Mr. Haley acknowledged in evidence that after reading the notice as closely as he had he knew that his colleague was required to testify. He testified that his colleague knew the hearing was scheduled for October 30th but had left town in order to begin his vacation the day of the hearing.

5. In this case the Board has not been satisfied that the statement before it represents the true wishes of those who signed it. The evidentiary burden, as is made clear in the posted notice, rests upon the persons who file the statement to establish that the sudden change of heart by those who signed membership cards in support of the union and then signed the statement in opposition represents a voluntary expression. Paragraph 7 of Form 5 states:

"Any employee, or group of employees, who had informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

**EXPLANATORY NOTE:** Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as pro-

vided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.”

6. The Board stated in the *Formosa Spring Brewery* case, [1974] OLRB Rep. Oct. 696:

“The Board has interpreted the words origination, preparation and circulation of the petition to be encompassed by and subsumed in the word ‘circumstances’ in terms of its requirement, for direct evidence of the subsistence of the document from the point of its inception to the point of its reception by the Board. This by definition would obviously include first-hand evidence detailing the physical preparation and the actual delivery of the document to the Board.”

See *Bausch and Lombe Optical Co. Limited* [1969] OLRB Rep. July 478, *Willow Press*, [1971] OLRB Rep. Feb. 59 and *Vered & Harvey Limited*, [1971] OLRB Rep. Nov. 736.

7. In this case the Board has no first hand evidence of the circumstances under which the statement was put into typed form. Furthermore, the Board has no first hand evidence going to the custody of the petition from the time Mr. Haley gave it to the company salesman in Mississauga including the circumstances under which three of the employees signed the document and the circumstances under which it was brought to the Board. Perhaps Mr. Haley’s colleague could have given evidence to satisfy these three requirements. He chose not to attend the hearing, however, and in the result we must find that we are unable to find that the statement represents a voluntary expression of those who signed. Accordingly, the Board hereby confirms its oral decision given at the hearing not to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote in circumstances where the trade union has evidenced membership support in excess of 55 per cent of those in the bargaining unit.

8. The Board received an undated letter from Mr. Haley on November 2, 1979 in which he asks for a review of the Board’s decision as given at the hearing. He argues that the statement of desire must be read as reducing the union’s support to a level as would justify the taking of a representation vote. He takes the position that the wishes of the employees are not clear and should be clarified by a vote. The Board has satisfied itself on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on the terminal date, and for the reasons set out in the body of this decision has been unable to conclude that the statement submitted by Mr. Haley represents a voluntary expression of those who signed. In these circumstances the Board has followed its normal practice and certified the applicant trade union without a vote. In the absence of anything in Mr. Haley’s letter as would give the Board reason to reconsider its decision, the Board is not prepared to amend or vary its decision in the matter.

9. A certificate will issue to the applicant.

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**1012-79-U James Lucas, Complainant, v. International Union of Operating Engineers, Local 793 and The Corporation of the County of Hastings, Respondents.**

**Duty of Fair Representation – Whether Union’s determination of issue perverse – Union acting arbitrarily – Union and Employer directed to process grievance**

**BEFORE:** E. Norris Davis, Vice-Chairman.

*APPEARANCES: I. G. Thorne and James Lucas for the complainant; J. Kennedy, P. Gauthier and G. Steers for respondent union; K. W. Kort and C. E. Bateman for The Corporation of the County of Hastings.*

**DECISION OF THE BOARD;** November 16, 1979

1. The complainant alleges that the respondent union which is a party to a collective agreement with the respondent employer, contravened Section 60 of the Act in its representation of him arising out of his termination of employment on April 27, 1979.

2. The complainant was employed as a labourer in the Roads Department of the County of Hastings from October 1975 until April 27, 1979 and worked out of Deloro, Ontario. It is the nature of the job that employees report to a central yard from which they may be assigned to various tasks at locations within the Municipality, to which they are conveyed by municipal trucks. During winter months one person, in addition to the truck driver, rides in the truck cab; at all other times two persons, in addition to the driver, ride in the cab. In this latter instance an additional seat, constructed by the Municipality, is inserted into the middle of the cab.

3. Approximately a year before his termination, July 4, 1978, the complainant suffered pains and some paralysis in his back which resulted in his consulting a doctor and the opening of a Workmen’s Compensation claim with him then receiving one day’s pay for lost time. The complainant states, on medical advice, he informed Wm. Kelly, Asst. General Foreman, to see if the seats could not be changed around. The complainant continued under medical supervision and was referred by his family physician to a specialist with whom he consulted on a number of times and who, on March 5, 1979 issued a note stating,

“Mr. Lucas is advised to abstain from sitting on the ‘home fabricated seats’ while riding on the truck at work. (copy forwarded to WCB Board of Labour)”

Lucas turned this note over to Kelly on March 6, 1979, who forwarded the note to the County Engineer.

4. In the meantime, on July 15, 1978, Lucas had contacted Graham Steers, Business Representative for the respondent, and informed Steers he had injured his back on the seat and wanted to put in a grievance. Steers stated he would look into the matter. It appears Lucas was also at this time in touch with the Business Manager of the respondent and Steers testified that in July 1978 he had received a letter from the Business Manager regarding correspondence with Lucas and asking him to take care of Lucas’ problem.



5. On July 17, 1978 Steers directed a letter to Lucas informing him that Steers had inspected the seat, had ridden in it and found it to be uncomfortable and had made recommendations to and accepted by the General Foreman to make modifications which in Steers' judgment would rectify the problem.

6. Lucas also raised the matter of the seat at two union meetings in March 1979, these being meetings related to contract negotiations in which the contract was reviewed, clause by clause, and Lucas raised the matter under a General Safety clause. The evidence is contradictory as to the precise manner in which the issue was raised and the manner in which it was disposed of. We are satisfied that the matter was raised and no relevant inference, insofar as the instant case is concerned, need be drawn as to the mode of handling at that meeting.

7. On April 27, 1979, the date of Lucas' termination, Lucas was assigned to truck #14 along with a Floyd Lucas, a lead hand who would drive, and Clarence Murphy, a summer foreman. Floyd Lucas told the complainant that he (the complainant) had been elected to ride in the centre seat and when the complainant stated he "wasn't going to", Floyd Lucas told him he would have to take it up with William Kelly, Asst. General Foreman who was then present in the yard. The complainant testified that he went to Kelly who asked if he had any equipment in the truck and when informed negatively, told the complainant to turn in his hard hat and gloves. The complainant asked if he had been fired and was told he had been and he then advised Kelly he would take the matter up at Head Office. Kelly, who testified, substantially corroborates this and states he said "either work or turn in your hat and gloves. Guess you are finished."

8. Following his termination interview with Kelly, Lucas set out for Belleville and on arrival phoned Graham Steers and told him he had been discharged and why and agreed with Steers to meet with the County Administrators. At a preliminary meeting with Steers the circumstances surrounding the termination were discussed, and Lucas and Steers then had a meeting with the County Engineer, Pinder, the purpose of which in Steers' words was "to see Lucas re-instated". This latter meeting continued for ½ to ¾ hours. Lucas states that he told Pinder he had been fired unjustly and wanted a grievance. Pinder's position was that he would go along with Kelly's decision. Lucas stated the truck should have regular seats and it was Pinder's position that the County could not afford these. Lucas states that he was really the spokesman at the meeting and that Steers took little or no part in the discussion; Steers corroborates this, as he says he didn't feel required to reiterate Lucas' position.

9. Following this meeting with Pinder, Lucas and Steers sat in Steers' car and Steers wrote down a statement of facts surrounding the termination and of the meeting with Pinder which Lucas signed. According to Lucas "Steers said he would have it typed up, would get in touch with me and I could come in and sign it and send it in.", and that Steers said he understood there was only five days to go ahead. Steers states that he took the statement and "weighed it in my mind and in light of previous problems with the seat, and that Lucas had been given a choice of riding in the seat or going home, and I didn't think there was a valid grievance there. I believe it was at this point that I said I didn't see how we could file a grievance and would seek further advice."

10. On April 30 Steers went to Deloro and spoke to Kelly to get his version of the April 27 incident, and that as a result of this his (Steers) decision remained the same.

11. On April 30 or May 1, Steers states he contacted Mr. E. A. Ford, Manager of the respondent's Labour Relations Department to secure his opinion. One or two days subsequent to this contact, Ford re-affirmed Steers' decision, stating that in his opinion "the only thing the County was guilty of was treating Lucas the same as all other employees".

12. Lucas states he tried to contact Steers on April 30 and May 1 and was unsuccessful, but that he met with him on May 2nd and gave him copies of all medical reports. Lucas states at that time Steers informed him that he was waiting for confirmation from the Labour Relations Department and that "he couldn't see why I should be fired under those conditions and that I should be on Workmen's Compensation because of it".

13. In the meantime, by letter dated May 1, 1979 directed to Lucas over the signature of Kelly, Lucas was informed, "This letter will confirm your discharge from the County of Hastings on April 27th, 1979 at 8:30 A.M. Local Time, for refusing to follow directions from your supervisor". Copy of this letter was forwarded to Steers on May 2nd.

14. Lucas testified that he talked by phone to an unidentified person in the Labour Relations Department around May 14th and enquired as to what was happening. Mr. P. A. Gauthier, a member of the Labour Relations Department testified that on May 15th Ford, Manager of the department informed him he had a contact from Lucas who was not satisfied with Steers' decision not to proceed with the grievance, and asking Gauthier to "make enquiries and get back to him". Consequently, Gauthier, that day, directed a letter to the Personnel Officer of the County which reads

"We have been contacted by our member Mr. James Lucas, S.I.N. #432-812-972, who claims to have been terminated without reasonable cause on April 27, 1979.

Could you please outline to us briefly in writing the reasons for the termination of Mr. Lucas."

This was responded to with copies of the letter sent to Lucas on May 1, 1979 and of a letter to Steers dated May 2, 1979 informing Steers that that letter had been sent to Lucas. This reply letter was not filed with the Board.

15. Gauthier then discussed the matter with Steers and then with Ford. Ford and Gauthier agreed that they could not proceed with the grievance because the versions of the employee and the employer relating to April 27th appeared to be the same. Consequently, he directed a letter to Lucas, dated May 28, 1979 reading as follows:

"Mr. E. A. Ford, the Manager of our Labour Relations Department asked me to check into the alleged termination without reasonable cause of April 27, 1979.

The information that we have received indicates that you were given an opportunity to follow certain directions from your Supervisor or not report for work, and that you chose not to follow those directions, which I am told were related solely to the specific nature of your employment with Hastings County.

From our experience at the Ontario Labour Relations Board, we feel that this action might be construed as a voluntary termination, and for that reason we have decided not to pursue a written grievance on your behalf.

If the above information is not correct, please feel free to contact us.”

16. Lucas testified that he had endeavoured to contact Gauthier several times by phone over the period June 5th through July 4th and despite leaving messages never received a return call. He submitted telephone bills evidencing the making of long distance calls to the respondent's telephone number and indicating he had been charged for calls of 1 to 6 minute duration; he also states he made additional calls from pay telephones. Gauthier in his testimony states he received no messages to return Lucas' calls and would have no reason to fail to do so. He further states that the respondent's in-office handling of communications generally works satisfactorily.

17. Lucas admits he contacted by phone the respondent's Business Manager on July 4, 1979 and requested a copy of the Union Constitution, and that he did not raise the question of his grievance because he assumed Kennedy was in agreement with the union position. He also testifies that he had placed the entire matter in the hands of counsel around June 15th. Lucas also testified that since his termination his Workmen's Compensation file has been re-opened, that he spent one month in the Compensation Board's hospital and has been placed on work restrictions requiring no more than 1 hour of standing, 1 hour of sitting, 1 hour of walking and a weight lifting restriction of 33 pounds, and has been receiving a 60% disability pension. He first became aware of the Compensation Board work restrictions in the week preceding the hearing of this matter. He states that he did discuss with Kelly in January 1979 the possibility that he could be assigned to other work than involving riding on the truck.

18. In our view the evidence before us does not justify the drawing of an inference that there existed in the respondent a subjective ill will towards Lucas or that it has acted discriminatorily or in bad faith. The issue remaining is whether the respondent's conduct, in all the circumstances, was arbitrary and therefore in contravention of the statute.

19. The Board in its past consideration of defining arbitrary conduct for the purposes of Section 60 has made clear that it cannot be influenced by the quality of the decision-making on a post hoc view, but must rather arrive at its conclusion having regard to the importance of the issue to the grievor, the qualifications and experience of the decision maker and whether in the particular circumstances there has been a directed turning of the mind by the union to the problem. The question as to what constitutes “arbitrary conduct” in a general sense is elusive and difficult to define, and as was said by the Board in the *Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union* case [1975] OLRB Rep. May 444, at page 464,

“On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of Section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision mak-



ing was intended. Accordingly at least flagrant errors in processing grievances – errors consistent with a ‘not caring’ attitude – must be inconsistent with the duty of fair representation . . .”

20. The question of riding in the “home made seat” had been an important issue to Lucas from July 4, 1978 when he first suffered a back injury, and at that time in response to his complaints Steers investigated the matter of the seat, and made certain recommendations to the employer for revisions. It must be noted that the matter would be a dormant issue over the winter months as the “home made” seat was not utilized during that period. On March 6th Lucas delivered to his employer a written medical recommendation that he not be required to ride in this seat, and also in March Lucas raised the issue by way of an attack on the general safety provisions at two union contract negotiation meetings. The incident of April 27, 1979 appears to have been the first occasion following the winter months when the “home made” seat came back into focus although, from photographs filed with the Board, it is evident that very considerable revisions had been made to the construction of that seat over the intervening period and that may have constituted a major change in circumstance. The evidence is silent as to whether Lucas was aware of the nature of the “new” seat at the time of his refusal and is equally silent in respect to whether the changes which had been effected in the seat were a subject of discussion between Kelly and Lucas, or Pinder and Lucas.

21. Steers, on April 27, 1979, was aware of the Lucas’ medical restriction and that it had been registered with the employer. It is clear that, whether or not Steers on April 27, 1979 told Lucas that he didn’t see how a grievance could be filed, that no decision had been made by the Union in respect to processing the grievance, and this status existed on May 3, 1979 when Lucas visited the Union office and provided Steers with copies of medical opinions and reports. This time Lucas was also informed that Steers was awaiting a recommendation from the Union’s Labour Relations Department before proceeding. The next development was Lucas phoning the Labour Relations Department on May 14, 1979 and Gauthier’s enquiry to the employer as to reasons for termination on May 15th. This was followed by the employer providing Gauthier a copy of its May 1st letter to Lucas advising him he had been discharged for failure to follow directions. The decision was then made and communicated to Lucas on May 28th that a grievance would not be pursued because the union felt “that this action might be construed as a voluntary termination”.

22. In arriving at our determination we must have regard to the fact that the decision-makers of the respondent were possessed of a high degree of expertise in these matters, and were dealing with an issue which was of the highest importance to the complainant, namely his loss of employment. It was clear at the time of decision making that the respondent was aware that both the employer and Lucas characterized the action as a “discharge” and that Lucas challenged the discharge on the grounds that based on medical advice he refused to follow instructions because of apprehension of personal injury. We express no opinion on the merits of the grounds advanced as a justification for refusal to follow instructions, but we believe that it was patent that the circumstances could only be characterized as a “discharge” and not as a “voluntary quit”. The respondent’s improper characterization of the complaint, in all the circumstances, was almost perverse and resulted in the respondent effectively barring itself from directing its mind to the real question. This is conduct which in our view is arbitrary within the meaning of Section 60 of the Act.

23. It was argued that the collective agreement permitted an employee to file a grievance in writing at the first step with or without union representation and that the actions of the respondent did not therefore prejudice Lucas. But the fact is that Lucas elected to rely, as he is entitled so to do, on the respondent to represent him and the respondent had a statutory duty to do so.

24. Counsel for the employer argued that the time delays involved in bringing this matter before the Board are such that the Board should not grant remedial relief in view of the potential prejudice to it. The Board generally considers that in the absence of extreme delay which in our view does not exist in the instant case the matter in issue should be adjudicated on its merits and that the matter of delay should be referable only to the quantum of relief should there be a finding of liability.

25. Pursuant to Section 79(4) the Board directs the respondent trade union and the respondent employer to forthwith process Mr. Lucas' grievance that he was discharged without just cause on April 27, 1979 commencing at the first step of the grievance procedure as detailed in Article 8.3 and Article 9 of the collective agreement, and that the time limits prescribed in the collective agreement for doing of anything in the processing of such grievance shall be nullified and ineffective to bar the processing of such grievance. The Board further directs that any settlement of the grievance by the parties must be concurred in by Mr. Lucas except that if the matter proceeds to arbitration the implementation of any arbitration award obviously is not dependent on such concurrence. In the event that a settlement by the parties or a Board of Arbitration determines that compensation is due to Lucas, this Board will remain seized of this complaint and will entertain representations with respect to the amount of compensation, if any, which is to be borne by the respondent union.

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**2152-78-U; 2153-78-U Ontario Public Service Employees Union,  
Complainant, v. Board of Governors of Durham College of Applied Arts and  
Technology, Respondent.**

**Discharge for Union Activity – Grievor honouring picket line established by other bargaining unit – Encouraging others to honour picket line – Whether Grievor's activity protected by The Colleges Collective Bargaining Act – Whether Grievor engaging in lawful union activity**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and H. Simon.

**APPEARANCES:** *Chris G. Paliare for the applicant; R. R. Dunsmore and others for the respondent.*

**DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD AND BOARD MEMBER J. D. BELL;** November 7, 1979

1. These matters consist of two applications brought under *The Colleges Collective Bargaining Act, 1975*. File No. 2153-78-U is a complaint seeking remedial relief under section 78 of the Act for alleged violations of the Act. File No. 2152-78-U is an application un-



der section 90 for consent to prosecute the respondent for those alleged violations. The parties have been advised orally of the Board's decision to dismiss the latter application without prejudice to the former one and the Board's reasons for that decision are contained herein.

2. The complainant has alleged that the respondent violated sections 66 and 76 of the Act when it dismissed Mr. Fred King, the grievor in both applications, from teaching in its extension (i.e., night school) program because the dismissal was motivated by King's union activity and his lawful exercise of rights which are protected by the Act. Two bargaining units have been created by the Act across all Colleges of Applied Arts and Technology in Ontario: one for academic staff and one for support staff. The Ontario Public Service Employees Union ("the union") is the bargaining agent for employees in both units. At all times material to these applications, King was president of the union's local 354 which represents the respondent's academic staff.

3. King is a teaching master in the respondent's Technology Division and a full-time member of its academic staff, therefore he is in the academic staff bargaining unit. He has been a teaching master since the college opened in 1967 and regularly has taught in its extension program since that date. King and others who teach in that program are under *de facto* individual contracts to teach their particular course for a specified teaching term or academic year. They are not employees as defined by the Act when they are performing that work because of the terms of these contracts. Both parties agree that teaching in the extension program is not subject to the collective bargaining mechanisms of the Act. When the incident occurred which gave rise to these applications, King was teaching a course in the extension program for the Applied Arts Division of the College. He is one of some 40 teachers who, in addition to teaching full-time in the regular daytime academic program, teach in the extension program.

4. The union commenced a lawful strike of the support staff bargaining unit on January 24, 1979. The strike ended on February 7th, 1979 following a vote of the employees. When the strike began, the respondent took steps to assure the continued operation of the college. As part of its business as usual policy, it notified students and all staff who were not affected by the strike that day and night school classes would be held as scheduled. It also stated that students and staff would be expected to be in class or at work and that failure to attend would be unauthorized and might be subject to penalties. Picket lines were set up at the college. On January 25th, the day after the strike started, King issued a news letter from local 354 to the academic staff, the contents of which included the statement "Do not cross the picket line for extension classes. This is not work covered by the contract.". King admits that this was an instruction to the academic staff not to cross the support staff picket line in order to teach their extension courses. If the academic staff had heeded the instruction it would have meant that they would not have taught their courses for the duration of the strike. King was scheduled to teach his own extension course on January 30th, but on the evening of the 29th he telephoned the students and told them that the class was cancelled because he would not cross the picket line. When he did this he had not consulted with either the supervisor responsible for his extension course or with Mr. Michie, the Director of the Applied Arts Division. Michie, who was aware of King's instruction to faculty not to cross the picket line in order to teach extension courses and who was also responsible for seeing that the college's objective of business as usual was met in his own division, initiated contact with King on the morning of January 30th to learn what his intentions were in respect of teaching his class that evening. King informed Michie that his reason was his unwillingness



to cross the picket line. Michie did not attempt, at the time, either to compel King to teach his class that evening or to caution him about the possible consequences of not doing so. Michie concluded from the picket line reference that King was not prepared to teach his class for the duration of the strike. King did not teach his class on February 6th either, although there was no picket line at the college. Nor did he telephone the students to inform them that there would be no class.

5. King was active in supporting the strike in other ways and characterized his role as resulting from his office of president of local 354. He claims that his actions were initiated by membership decision, executive decision or on humanitarian grounds, which the Board infers to be for his personal reasons. He was active on the picket line on his own time and a prominent subject of local news media reports on the strike. On January 29th at a joint meeting of local 354 and the support staff local he presided at the passage of a resolution by the academic staff that they would book off sick from classes on January 31st as a show of their support for the strike. King did not vote on the motion. Nor did he speak to it or attempt to caution the membership that such action might be a violation of the Act and of the collective agreement. He was one of three teachers who did not report for teaching duties on January 31st.

6. On February 9th, the Dean of Academic Studies, Mr. J. L. Robinson, advised King in writing that his "... services for night school teaching are no longer required." The reason given in the written advice for this action was that King had cancelled his night school class for the duration of the strike and so informed his students. Dean Robinson stated that this was the principle reason for King's dismissal because his action, taken without following the proper procedure and with his knowledge that the college had directed that extension classes continue during the strike, was a *de facto* violation of his contract to teach the extension course. Robinson admitted at the hearing that he took into account two other factors as well. These were King's instructions to the other academic staff not to cross the picket line to teach extension classes plus the effect that this might have on the extension program now and in the future when viewed along with a threat made in 1975 that academic staff would not be available to teach in the program. Robinson was referring to a resolution passed by the academic staff on March 26, 1975 stating that they would not be available to teach in the College's extension program commencing September 1975. This issue arose at the same time that the union was negotiating on behalf of the academic staff bargaining unit with the employer bargaining agent. The issue was not a subject at the bargaining table since night school teachers, including regular academic staff who are under individual contract to teach in the extension program, are not subject to the collective bargaining mechanisms of the Act. There was, however, an issue of teacher workload with which an interest arbitrator was dealing. In dealing with that issue he had made reference to teachers teaching in the extension program. This reference drew the response of the resolution passed by the College's academic staff. King, as president of the academic local, promoted adoption of the resolution and told the Board that it meant, as of its passage, none of the academic staff would have taught in the extension program beginning in September 1975. The parties ultimately resolved the issue amicably. Robinson considered that King's actions in 1979 (including his two cancellations of his night school course), when viewed together with the 1975 episode, to be an attempt to disrupt the college's entire extension program. Robinson concluded that it would threaten the future of the program if King's actions were allowed to pass without discipline being applied.

7. The complainant contends that the respondent was motivated to dismiss King from teaching in the extension program because of his union activity, in particular the high-profile he maintained during the support staff strike and his role in the 1975 academic staff bargaining in respect of the threatened boycott of the extension program. The complainant points, in support of its contention, to the fact that the one other teacher who did not teach one of his extension classes during the strike was not disciplined. Moreover, the complainant claims that King followed accepted practice at the college in cancelling his class. Complainant counsel argues that the respondent's treatment of King is meant to discourage academic and support staff alike from pursuing an active role in the union. More particularly, counsel argues that there is also a warning to the academic staff that, if they assert their rights to be active in the union in a manner which the respondent views as interference with its extension program, they do so at the risk of being dealt with in the same manner as King. This is the basis on which the complainant is asking the Board to find that the respondent has violated section 66 and subsections 1, 2, and 3 of section 76 of the Act.

8. The respondent submits that its dismissal of King from teaching in the extension program was based upon his failure to teach his extension course on January 30th and February 6th, including his failure to follow the college's procedure for cancelling extension classes. It considered King's actions, when coupled with his efforts to induce other faculty not to teach their extension courses, to have been an attempt to disrupt the respondent's extension program. Since the respondent viewed King as having played a key role in the threatened boycott of the program in 1975, it decided that disciplinary action was required and took the action now being challenged in these complaints. While the respondent partially relied on these circumstances as well for disciplining King and not the other teacher referred to by the complainant, it gave as its primary reason for the difference in treatment the fact that King failed to follow the college's procedure in cancelling his first class and that he cancelled it in a manner which displayed an intent not to teach his course for the duration of the strike. The respondent considers that King's failure to teach his course on January 30th and February 6th and his instruction to other faculty not to cross the picket line to teach extension classes are a further demonstration that it was King's intent not to teach his course for the duration of the strike. The other teacher neither refused to teach his class nor cancelled it. When he was asked by his supervisor if he was going to teach the class, he was uncertain. The supervisor decided to cancel the class and arranged for the students to be advised.

9. Turning now to the statute, section 66 is in the nature of a declaration of rights and does not in itself create any offence. Therefore the complaint in respect of that section is dismissed. The rights declared by section 66, however, are extremely important ones and the section states: "Every person is free to join an employee organization of his own choice and to participate in its lawful activities." These rights are the heart of the Act and are secured by other sections against interference by employers and trade unions. These include subsections 1, 2 and 3 of section 76 of the Act, the ones which the complainant alleges have been violated by the respondent's discipline of King, and if the Board is satisfied that the respondent has violated those sections, section 78(4)(a) of the Act gives it the authority to construct an appropriate remedy. The issue in this complaint is whether the dismissal of King from teaching in the extension program:

- (a) constitutes interference with the administration of the complainant (section 76(1));



- (b) was influenced by King's lawful union activity; or
- (c) was influenced by any anti-union motive of the respondent, including attempting to discourage staff from pursuing an active role in the complainant's affairs.

An important factor in determining that issue is the measure of protection King has under the Act when he is teaching in the extension program because, as stated in paragraph 3 above, this activity is not subject to the collective bargaining procedures of the Act and, when he is performing that work, he is not an employee for purposes of the Act. This does not mean he is without any protection under the Act, however. He is protected by those sections such as section 76(2)(a) and section 76(3) which protect "persons" against specified acts of discrimination, intimidation or coercion by employers or trade unions. He is protected also as an employee (in his regular academic role) from those same acts if the discrimination, intimidation or coercion occurs by penalizing him in respect of his extension teaching. For example, if he was dismissed (or otherwise discriminated against) in respect of that teaching because, as an employee, he was participating in the lawful activities of the union.

10. The facts in this case are quite clear. On February 9, 1979, King was dismissed from teaching in the extension program. This followed closely upon his display of active support for the striking support staff which took the form of: not teaching two classes of his extension course during the strike; instructing other academic staff not to cross the picket line in order to teach their extension classes; maintaining a high-profile on the picket line; and not reporting to teach his regular day class on January 31st, the day of the sick-in. In March 1975 King had been involved actively, as president of the academic staff local union, with the adoption of the resolution which as of its date, meant that no academic staff would be available to teach in the College's extension program starting in September 1975. From these same facts, however, the parties are seeking to have the Board draw opposing inferences. This is the usual situation presented to the Board whenever it is dealing with this type of complaint, whether it arises under this Act or *The Labour Relations Act*. The Board's task in determining a complaint is the same under both statutes, even though section 78(4)(a) of the Act does not contain the reverse onus of proof which is in section 79(4a) of *The Labour Relations Act* and which places the burden of proof on the respondent. The Board, under either statute, must determine whether the action complained of was taken for reasons which were influenced by anti-union sentiment or by an employee or trade union exercising rights under the particular Act. While the respondent in a complaint may establish just cause as an explanation for his actions, it is not the Board's task to determine whether there is sufficient or just cause. As the Board stated in *De Vilbiss (Canada) Limited*, [1975] OLRB Rep. Sept. 678, in explaining why just cause alone was not a complete defence for the employer, "To take any other approach would be to allow anti-union conduct to masquerade as just cause." Nor does the absence of just cause create a successful case for a complainant. The Board's many decisions dealing with complaints under *The Labour Relations Act* that employers have interfered with the rights of trade unions and employees and thus have violated the statutory provisions which protect those rights, show clearly that the critical element in determining a complaint is whether the employer's actions contain any anti-union motive. This applies in decisions rendered prior to and after the addition to the Act in 1975 of section 79(4a). For example, see the Board's decision in *Delhi Metal Products Limited*, [1974] OLRB Rep. July 450 and the cases cited therein. It also may be construed reasonably from these many decisions that the co-existence of union activity and an employ-



er's impugned activity is not sufficient to sustain a complaint that the protective provisions of the Act have been violated. It is not necessary under section 76(1) of the Act, however, for the complainant to establish any anti-union motive in order to prove interference with its administration (see for example *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751, paragraph 30).

11. Having regard to the foregoing, then, the case before this Board turns on whether in its discipline of King, the respondent was:

- (a) interfering with the administration of the complainant;
- (b) influenced by King's lawful union activities; or
- (c) seeking to discourage other employees from pursuing an active role in the union.

The complainant is relying on two premises in seeking to have the Board find that the respondent's treatment of King violates the Act. First, that the respondent had discriminated against King by disciplining him and not the other teacher who did not teach his extension class during the strike and that the Board should infer from this discrimination that it was based on King's union activity. Second, King's activities, including those which the respondent has admitted taking into account in fashioning its discipline, were the lawful exercise of rights under the Act.

12. The complainant relies for support of its first premise on the claim that King followed an established practice for cancelling night classes when he cancelled his class on January 30th and also on what the complainant considers to be the unreasonable contrast in the severity of the discipline applied to King in respect of teaching in the extension program and that applied to him and the two other teachers for their observance of the sick-in. The complainant contends that most employers would find the sick-in offense to be more grievous than the offense of cancelling night classes, therefore it follows that the discipline for the sick-in offense should have been the more severe of the two. The fact that the reverse situation exists here supports, in the complainant's view, its contention that the respondent was discriminating in its other discipline of King because of his union activity.

13. In respect of the complainant's first premise the evidence before the Board is that the respondent requires persons teaching in the extension program who find it necessary to cancel a class, to notify in advance the appropriate supervisor, or another delegated person in the supervisor's absence. The supervisor (or his delegate) then either agrees to the cancellation and arranges for the students to be advised, or substitutes some other arrangement for the class. There is evidence, also, that in some exigencies the College accepts having the teacher cancel the class and notify his supervisor afterwards. Having regard to that evidence and in view of the respondent's stated objective that extension classes were to continue as usual during the strike, it was reasonable for the respondent to expect its usual requirements for cancellation of a night class to be followed and to discipline King for not doing so. The fact that it did not discipline the other teacher is not evidence of discrimination against King when, in fact, the other teacher had not cancelled his class (according to his own evidence, that decision was made for him by his supervisor) and therefore had not committed a disciplinable offense. Insofar as the discipline for the sick-in is concerned, the respondent ex-

plained its course of action on the grounds that the sick-in was almost a total failure and, therefore, called for minimal discipline. The respondent deemed this to be the loss of day's pay and a written warning for each of the three offenders. The Board does not find in these circumstances any foundation in the complainant's first premise for inferring the existence of an anti-union motive.

14. Turning to the complainant's second premise that King's discipline was influenced by his lawful exercise of rights under the Act, the complainant is relying on King's following activities:

- (a) Maintaining a high profile role on the picket line.
- (b) Refusing to cross the picket line to teach his extension course.
- (c) Issuing the instruction to other academic staff, who were teaching in the extension program, not to cross the support staff picket line in order to teach their extension classes.
- (d) Promoting and communicating to the respondent the 1975 resolution that academic staff would not be available to teach in the extension program.

The respondent denies that King's role on the support staff picket line had any influence whatsoever on its discipline even though it followed closely upon King's active participation on the line. Does the mere proximity of the events, with the discipline following the picketing, prove that the former was caused or influenced by the second? Although the relationship raises a natural suspicion that the two events are connected, in order to find so, the Board believes it must have either evidence which connects the two or which allows the Board to draw the inference that they were related. There is no evidence before the Board which directly connects the two events and it would be unusual in this type of complaint if there was. As for inferring a connection, the Board has already found that the manner in which the respondent exercised its discipline does not support an inference of anti-union motive and there is no evidence of a pattern of anti-union activity by the respondent. In the absence of such evidence, or any other evidence of anti-union motive, there is no basis for the Board to draw reasonably the inference that the respondent was motivated or influenced to discipline King because of his picket line activities.

15. The other three activities are ones which the respondent admits taking into consideration when fashioning King's discipline. In respect of item (b), while it was not King's bargaining unit which was on strike or his local which was picketing the respondent, it was his right to exercise his personal choice between whether to honour the picket line or his contractual obligation to teach his extension course. In making the choice to honour the picket line and not his contractual obligation, he was doing so at his own risk since this is not a right falling within that measure of protection by which he is covered in respect of his extension teaching. Nor may it be said that his attempt to encourage other members of the academic staff to not cross the picket line to teach their extension courses is a right protected by the Act; in fact, it was an attempt to encourage a breach of contract. The incident of the 1975 resolution did arise during the time when the union and the employee bargaining agent were attempting to conclude a collective agreement and King, as president of the academic local



union at the College, was involved with the collective bargaining. The resolution was the result of the reaction of the respondent's academic staff to the manner in which the interest arbitrator was proposing to deal with a legitimate issue of teaching work load in the regular academic program. The resolution, which was promoted by King in his capacity as president, was in effect a group decision of the teachers not to renew their individual contracts to teach in the extension program. While this decision was made in reaction to a bargaining issue in negotiations conducted pursuant to the Act, it was made in respect of an activity outside of the Act. King (and the other teachers) had the right to decide whether to make and use the decision in order to gain some benefit at the bargaining table. This connection is insufficient in the Board's view, however, to bring the action within that measure of protection available to them under the Act. Therefore, while the respondent took all three of these activities into account in its discipline of King, it has not violated the Act because these are not activities which fall within the protection of the Act.

16. In summary and for the foregoing reasons, King's activities in support of the union and the respondent's reaction to them do not either constitute a violation of the Act by the respondent or support the inference that the respondent was influenced to discipline King by reason of any anti-union motives.

17. The complainant's allegation that King's discipline constituted interference with the administration of the complainant is based on its claim that King was disciplined for engaging in lawful union activities and also on the claim that the respondent's treatment of King was intended to be an example which would discourage other staff from participating in lawful union activities. The Board has already disposed of the first ground by the Board's findings on each of those activities. The second ground was contended on the premise that King's actions viewed collectively would be seen by the respondent's staff as being in support of the union and the fact that his discipline followed on the heels of his actions would convey the clear message that active support of the union would attract similar retribution from the respondent. This contention must fail too, for while that might appear to be the case, since each action individually has been found not to provide the basis for establishing a violation of the Act, they cannot then be found collectively to establish a violation.

18. We conclude, therefore, from all of the facts in this matter that the respondent had a *bona fide* concern for its extension program, and as a result, dismissed King from teaching in the program for the reasons stated to the Board. It follows that the respondent has not violated subsections (1), (2) and (3) of section 76 of the Act, thus the complaint brought under section 78 of the Act is dismissed.

19. The Board's reasons for dismissing the application for consent to prosecute remain to be dealt with. The Board refused its consent and dismissed the application because, even if the respondent's impugned activity might have supported a *prima facie* finding that the Act had been violated, the Board was not satisfied that a criminal prosecution was consistent with the promotion of sound industrial relations between either the parties to the application or the parties to the collective agreement. The Board was of the view that if it found that conduct to be a violation of the Act, adequate remedy was available under section 78 without recourse to criminal prosecution. While this is a qualification applied by the Board in exercising its discretion under section 90 of *The Labour Relations Act*, it is equally applicable to the exercise of the Board's discretion under section 90(6) of this Act.



### DECISION OF BOARD MEMBER H. SIMON:

1. Having regard to all of the facts before us I would have found that the respondent had violated subsections (1), (2) and (3) of section 76 of the Act.
  2. I agree with the Board's decision to dismiss the application for consent to prosecute for the reasons given.
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**0873-79-M; 0900-79-M; 0901-79-M; 0902-79-M** Kevin Crow, et al,  
Applicants, v. Amalgamated Meat Cutters and Butcher Workmen of North  
America, AFL, CIO, CLC, Respondent Trade Union, v. **Gordons Markets**,  
Division of Zehrmart Limited, Respondent Employer.

**Religious Objection – Objection to supporting particular union – Whether religious exemption applicable**

**BEFORE:** M. G. Picher, Vice-Chairman, and Board Members J.A. Ronson and W.F. Rutherford.

**APPEARANCES:** *Gerald Vandezande for applicants; Harold F. Caley and Dennis Sexton for respondent trade union; B.D. Mulroney for respondent employer.*

**DECISION OF M.G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER J.A. RONSON;** November 19, 1979

1. The Board finds that these applications should and the same hereby are consolidated.
2. The respondent trade union holds bargaining rights for employees in a number of retail supermarkets of the respondent employer in a bargaining unit covering some eleven municipalities in southwestern Ontario. Each of the applicants is employed in a store within the bargaining unit and covered by a first collective agreement arising out of minutes of settlement between the employer and the union dated July 9, 1979. The agreement provides for mandatory union membership and the payment of union dues by all permanent employees. The four applicants request exemption, pursuant to section 39 of the Act, from those obligations by reason of their religious belief.
3. Section 39 of the Act provides as follows:
 

“(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause a of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization in Canada under Part I of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

(a) subject to clause b, to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with that employer and only during the life of such collective agreement;”

4. In order to succeed the applicants must satisfy the Board that their beliefs are sincerely held, that they are religious and are the cause of their objection either to being union members or to paying union dues. (*University of Ottawa* [1976] OLRB Rep. Aug. 422.) The applicant Kevin Crow is a convert to the Canadian Reform Church. Although he has not yet been admitted as a full member, he has been taking lessons for approximately a year with a view to becoming a confessing member. The applicants Mel, Corinne and John De Boer are brothers and sister. They are all members by baptism of the Canadian Reform Church; Mel De Boer is also a confessing member while his brother and sister are, along with Mr. Crow, attending regular Bible study sessions in order to become full members of the church's Chatham congregation.

5. The evidence establishes that the applicants' religious training has led them to a conscientious objection to supporting the respondent trade union. In their view the teaching of the Bible requires that they submit to the authority of their employer. They believe that to associate themselves with a trade union which is adversarial to the employer would be to act contrary to the will of God. Their objections are religious in nature and the Board is satisfied, upon the evidence, that they are sincerely held.

6. Counsel for the respondent trade union submits that the evidence of the applicants, with the possible exception of one of them, did not establish that they object to the paying of dues to the union but only that they object to joining the union. On that basis he submitted that the Board should not exempt at least three of the applicants from the payment of dues as required by the collective agreement. In our view that submission is without merit. It is clear from the evidence that the applicants have a genuine religious objection to lending any support whatever to the respondent trade union. All four applicants prepared their applications in consultation with each other and worded them identically. During their testimony two of them specifically named the charity to which they would want to donate amounts equal to their union dues in the event that their application is successful. The fact that their agent did not specifically ask two of them where they would want those monies directed, a matter in any event to be settled by agreement with the union, does not cause the

Board to doubt that their objection goes not only to membership but to the payment of dues in support of an organization which is contrary to their religion.

7. For the foregoing reasons it is hereby ordered that:

- (1) The mandatory union membership provision of the collective agreement between the respondent trade union and the respondent employer entered into on July 9, 1979 does not apply to the applicants.
- (2) The applicants are not required to pay any dues to the respondent union provided that amounts equal to any dues or other assessments are paid by the applicants to a charitable organization mutually agreed upon by the applicants and the respondent trade union. However, if the applicant and the respondent trade union fail to so agree then the parties shall inform the Board in writing forthwith, including such representations, if any, that each may care to make as to the charitable organization to be designated and the Board will then designate a charitable organization pursuant to section 39(1) of *The Labour Relations Act*.

**DECISION OF BOARD MEMBER W. F. RUTHERFORD:**

1. I agree with the majority of the Board in granting a religious exemption to Mr. Crow, but I dissent from the decision granting the exemption to the other three applicants.

2. Kevin Crow stated that his religious convictions prohibited him from joining any trade union even if it was affiliated with a church that he might be a member of. This stated position permits the type of relief offered by section 39 of the Act. I therefore concur in granting the exemption to Mr. Crow.

3. However, I would dismiss the application filed by Corinne De Boer, Mel De Boer and John De Boer. The collective statements of the De Boers indicated that their knowledge of trade unions arose from family discussions in their home and that they were not opposed to *all* trade unions, but would join and support a trade union affiliated with their church, The Canadian Reform Church.

4. There was no evidence presented to the Board to suggest that the objectives and policies of the respondent trade union were in conflict with the religious beliefs and practices of The Canadian Reform Church. The three De Boers do not object to joining or paying dues to all trade unions, but only to a trade union which would place them in conflict with the teachings of their church. Thus, as there was no evidence led to establish that such a situation would arise by virtue of the De Boers' membership in the respondent trade union, the application by the De Boers ought to be dismissed.

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**0740-79-M Groves Park Lodge, Employer, v. Canadian Union of Public Employees and its Local 2103, Trade Union.**

**Conciliation – Reference – Whether application for termination of bargaining rights affecting Minister's authority to appoint conciliation officer**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES.** *P. B. Kane for the employer, Mario Hiki and Jim Woodward for the trade union.*

**DECISION OF THE BOARD; November 15, 1979**

1. This is a reference by the Minister to The Ontario Labour Relations Board pursuant to section 96 of *The Labour Relations Act*. The Minister has asked the Board to advise him as to whether or not he has the authority under *The Labour Relations Act* to appoint a conciliation officer.

2. The relevant provision of the Act is as follows:

“15(1) Where notice has been given under section 13 or 45, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.”

3. The trade union, CUPE, Local 2103, made a request to the Minister under section 15 of the Act for the appointment of a conciliation officer. The request was dated June 20th, 1979 and followed two notices to bargain sent by the union to the employer to which the union received no reply. The employer disputes the timeliness of the first notice to bargain but acknowledges that the second notice was proper in all respects.

4. The Board's hearing of the reference from the Minister was delayed by agreement of the parties pending the Board's determination of an application for termination of the trade union's bargaining rights filed by the employees of the respondent. In a decision dated September 24, 1979 the Board dismissed the termination application of the employees. Two days prior the hearing scheduled for the section 96 reference and an outstanding section 79 complainant filed against the employer, new counsel was retained by the employer. The newly retained counsel requested an adjournment of both matters to provide him with sufficient time to become familiar with the case. In view of the circumstances the union consented to the adjournment. During the time between the originally scheduled hearing in September and the date upon which the section 96 application was actually heard in October, the employees filed a new application for termination.

5. Counsel for the employer argues that the new termination application deprives the Minister of authority under section 15(1) of the Act to appoint a conciliation officer. Counsel argues that the filing of the application for termination places the bargaining rights of the union in a state of limbo and that it is impossible to determine whether the union is actually a “party” within the meaning of section 15 until the termination application is fully determined.

6. Counsel for the respondent relied on two decisions of the Board to support his assertion that an application for termination raises doubts as to the viability of the union's bargaining rights: *Tidey Construction Co. Ltd.*, [1966] OLRB Rep. Jan. 749 and *Baker Burney & McLaren Ltd.*, [1976] OLRB Rep. March 78. In both cases the Board confirmed the trade union's bargaining rights and in doing so noted the absence of either an application for termination of bargaining rights or an abandonment of bargaining rights. On reviewing those cases it is abundantly clear that the Board's references to the application for termination were of a general nature. As no application for termination had been made there could obviously have been no declaration terminating the union's bargaining rights so as to raise questions about the continuation of the union's bargaining rights. The Board was not suggesting that the mere filing of an application for termination could bring into question the viability of the union's bargaining rights.

7. The pre-conditions to the appointment of a conciliation officer under section 15(1) of the Act are that proper notice has been given under either section 13 or section 45 of the Act and that a request to the Minister to make the appointment has been made by either the trade union holding bargaining rights or the employer of the employees in the bargaining unit in question. The Act does not stipulate that an application for termination should in any way fetter the Minister's authority to appoint a conciliation officer. Once a union has attained bargaining rights for a group of employees it has not only the right but also the duty to represent them and bargain on their behalf until those rights have been terminated by the Board.

8. The legislation provides periodic intervals (see section 49 of *The Labour Relations Act* and section 9 of *The Hospital Labour Disputes Arbitration Act*) where employees are given a right to apply to the Board for a declaration terminating the union's rights as the exclusive bargaining agent for the employees. The union's right and duty to bargain on behalf of the employees and the employee's right to apply for a termination of those bargaining rights operate concurrently during the open periods provided for employees. The mere filing of an application for termination does not dampen the union's right or attendant duties to represent the employees.

9. If an application for termination, standing alone, were to place a veil of uncertainty over a union's right to bargain on behalf of the employees, the rights of all concerned would be seriously prejudiced by the lengthy delays in bargaining that would inevitably follow. Unless the parties agree that bargaining should be deferred pending the determination of a termination application, it is in the best labour relations interests of the parties for the union and employer to proceed with their negotiations. In this case, for example, the union applied for conciliation over four months ago. As noted above, the section 96 reference to this Board concerning the appointment of the conciliation officer was originally deferred by agreement of the parties pending the resolution of the first termination application. If the second termination application could further delay the appointment of the conciliation officer and if the application is ultimately dismissed, the further postponement in bargaining occasioned by these applications would be substantial and seriously prejudice the legitimate interests of the union and employees. We might note that if the section 96 reference had been heard when originally scheduled in September following the disposition of the termination application rather than adjourned for the benefit of employer counsel, the employer could not have opposed the appointment of the conciliation officer on the grounds advanced in this case because no application for termination would have been made at that time.

10. For the reasons set out above, the Board finds that the filing of an application for termination does not cast any doubt on the union's status as a party within the meaning of section 15(1). As it is agreed that proper notice was given under section 45 of the Act, the Board is of the view that the Minister has the authority to appoint a conciliation officer to meet with the parties and endeavour to effect a collective agreement.

11. As an alternative argument counsel for the respondent contended that if the Board confirmed the Minister's authority to appoint a conciliation officer it should recommend that the Minister delay the appointment until the termination application is disposed of. In view of the mandatory nature of section 15(1) and for the reasons set out above relating to the prejudice occasioned by delay, the Board is of the view that an appointment made under section 15(1) is an appointment that, in the absence of an agreement of the parties to the contrary, should be made forthwith.

12. In answer to the question referred to this Board by the Minister pursuant to section 96 of the Act, the Board is of the view that the Minister has the authority under section 15 of the Act to appoint a conciliation officer.

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**0096-79-U** Clark Millaire, Complainant, v. Canadian Guards Association, Local 105, K. B. Watts, R. Tracy, R. O'Brien, R. Butler, Respondents, v. Inco Metals Company, Interested Party.

**Duty of Fair Representation – Union acting according to membership wishes – Complainant suspended from membership – Union's internal procedure not affecting fair representation of complainant – No violation of section 60**

**BEFORE:** Rory F. Egan, Vice-Chairman.

**APPEARANCES:** *S. Wilson and Clark Millaire for the complainant; Ken Watts and Robert O'Brien for the respondents; Ross Dunsmore and Eric Fenton for the interested party.*

**DECISION OF THE BOARD;** November 9, 1979

1. This is a complaint under section 79 of *The Labour Relations Act*. The complainant states that he has been dealt with by the respondents contrary to the provisions of sections 60, 63(4), 63(5) and 70(1) of the Act.

2. The named respondents are all officers of Canadian Guards Association, Local 105 (hereinafter called "Local 105"). Watts was President, Tracy First Vice-President, O'Brien Second Vice-President and Butler Secretary-Treasurer.

3. The complainant had been the Third Vice-President of Local 105 when the issues now before this Board arose. He was under suspension at the time he made this application.

4. Mr. Millaire gave the only *viva voce* evidence at the hearing before the Board. We



wish to make it clear that none of the written matter signed by Bob Tracy, First Vice-President of Local 105, and none of the written matter submitted by R. C. Butler, Secretary-Treasurer of Local 105, with the Reply has been accepted by the Board as evidence.

5. The formal complaint is in the following terms:

“On or about July 27, 1978 the grievor was dealt with by the Canadian Guards Association Local 105 of the respondent contrary to the provisions of sections 60 - 63(4) - 63(5) and 70(1) of The Labour Relations Act in that he did on his own behalf or on behalf of the respondent: The respondent entered into an interim agreement with Inco Metals Ltd. which altered the working conditions of the Collective Agreement between the parties, which also was not ratified in accordance with Section 63, O.L.R.A. and which was done in an arbitrary and discriminatory manner by contravening the Employment Standards Act, the Collective Agreement and an earlier arbitration award between the same parties. ...

Local 105, C.G.A. and individual respondents aforementioned have also acted in a discriminatory and arbitrary manner, contrary to Section 60, O.L.R.A., by persecuting the complainant for refusing to affix his signature as an officer of the Association to the interim agreement illegally entered into between the parties.”

6. Section 60 reads as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

7. Sections 63(4) and (5) provide:

“(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.”

8. Section 70(1) reads as follows:

“Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or

condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.”

9. The issue arose out of a proposal made by Inco Metals Company (hereinafter called “Inco”) with respect to the method of payment to be used and other relevant matters in the event of a strike by employees of the company represented by United Steelworkers of America.

10. A similar formula had been put into effect unilaterally in a previous strike. The method of payment introduced by Inco had not been acceptable to Local 105. The latter grieved and the matter went to arbitration. The arbitrator held that the existing provisions of the collective agreement covering the members of Local 105 should prevail over the formula used by the company.

11. At a meeting between Inco and Local 105’s Executive on June 30, 1978, Mr. McGhee, an industrial relations representative for the company, presented a formula to cover the matters referred to above. He asked the Executive Committee to have the membership ratify the proposal in order to avoid a situation similar to that dealt with in the arbitration case.

12. Mr. Millaire testified that at the meeting of June 30th he had indicated that he did not find the formula acceptable and that the only thing he agreed with was the suggestion that acceptance should only follow ratification by the membership.

13. A meeting of the membership of Local 105 was held on July 4th in two sections in order to accommodate members working on different shifts. The Minutes of this meeting were filed with the Board. Beside a marginal note of an item “Report of Officers”, the following appears:

“K. Watts reported on the meeting with INCO Metals Co. on June 30,

1978, about the work stoppage and the method of calculation of pay and other points mentioned at the meeting.

There will be no regular membership meeting in August, but a letter will be sent to all members requesting ideas for negotiations.

Moved by D. Whitman, Seconded by L. McGrayne, that K. Watts report be accepted and the executive be authorized to respond as they saw fit."

14. Mr. Millaire stated that a difference of opinion arose between himself and the other four members of the Executive as to what the membership had intended by the motion. It was Millaire's firm conviction that the motion amounted to a complete rejection of the company's proposal and took issue with the inclusion in the Minutes of the words indicating that the Executive were authorized to respond as they saw fit. It was his evidence that the motion was simply to reject the proposal and go back to the company and tell them.

15. The next regular general meeting of the membership was held in September. Mr. Millaire testified that the Minutes of the July meeting containing the phrase "as they saw fit" were read and adopted as read without objection by anyone. Mr. Millaire testified that he voted against the adoption of the July Minutes but he said he felt it was too late at that meeting for him to say anything to the membership to the effect that the Minutes were wrong. It is to be observed, however, that none of the members present at that meeting and to whom the minutes were read raised any objection as to their accuracy.

16. A meeting was called by the President of Local 105 by notice posted on July 17, 1978 for a special meeting for July 20, 1978, the purpose being to discuss the company's offer. Mr. Millaire told the Board that the company's offer was discussed. He said it was a long and detailed discussion. There was also some discussion concerning the parent body's by-laws with respect to meetings. Mr. Millaire stated that during the course of the meeting the President of the Local adjourned the meeting and called a "meeting within the meeting" to decide whether the offer should be accepted. Mr. Millaire objected to this procedure which he maintained invalidated the meeting and its results.

17. A motion was made at this meeting that the company's proposal be adopted subject to clarification on how guards might be flown in and out of the plant in the event of a strike. The motion was carried unanimously.

18. There is no doubt whatever on the basis of Mr. Millaire's own testimony that the question of acceptance of the proposal was put to the membership and that the membership accepted the proposal on the terms indicated above.

19. As a result of this meeting, a document was signed by the appropriate officers of the company and by the Executive of the Local, except for Mr. Millaire. Mr. Millaire refused to sign because the document contained the words: "It is understood that this method of repayment is acceptable to the Executive and ratified by the membership of the Canadian Guards Association".

20. Mr. Millaire took the firm position that the membership had not ratified the pro-



posals and that the union was acting in bad faith in signing the document containing assurances to the company that he felt were contrary to the facts.

21. As the result of his refusal to sign the document, Mr. Millaire was charged by his Local with a violation of the Constitution of the Canadian Guards Association and with failure to carry out the mandate of the membership by a Trial Board set up under the Constitution. This board was made up of J. Douglas Wiltsie, President (Executive Board Canadian Guard Association), Mr. I. Scagnetti, Member Local 107 (non-affected Local) and Mr. D. J. Dale, Member of Local 105 (member of affected Local). It was the decision of this board which led to Mr. Millaire's suspension to which earlier reference was made herein.

22. It is of interest to note that this Trial Board gave as its opinion that the July 20, 1978 meeting was, in fact, a legally-constituted meeting.

23. It should also be noted that Mr. Millaire launched a grievance under the collective agreement with respect to the method of payment which had been put into effect following the signing of the document, but did not pursue it beyond the first stage.

24. Mr. Millaire's overall position was that the whole of the proceedings leading up to the signing were factors in a total transaction carried out by the four other members of the Executive acting in bad faith. In addition to the procedural faults which he alleged, he also argued that the second meeting was called when a large number of the membership were on holidays. We might say at this point that holiday schedules which were not produced had been arranged prior to this occurrence and we are convinced that nothing turns upon this aspect of the case.

25. Mr. Millaire testified that the crux of the matter was that four members of the Local's executive thought that they had been authorized by the membership to do something, whereas he thought that they had not been so authorized. On the basis of that evidence it can only be concluded that an honest difference of opinion existed between Millaire and the other executives of the Local. The mere fact that four of the executives drew a conclusion different from that reached by Millaire does not reflect upon the good faith of either side. Good faith is the issue before this Board and not the question as to who is more likely to have been correct on the basis of numbers, although that factor cannot be ignored.

26. It is equally plain that there was a difference of opinion between Millaire, the Executive and, apparently, the membership of the union itself, with respect to procedural matters. (This issue, as we have indicated, was dealt with by the Trial Board and, according to that authority, Mr. Millaire's objections on procedure were not valid.) There is, however, as far as the evidence with respect to the issue before the Ontario Labour Relations Board is concerned, nothing from which it might be reasonably inferred that the respondents were acting in bad faith or with motives adverse to the general interest of the membership in proceeding as it did. Mr. Millaire argued that the calling of the second meeting was inconsistent with the "respond as they saw fit" position of the other four executives. The respondents, on the other hand, maintain that it was entirely consistent with the mandate to do as they saw fit. However that may be, it remains clear, beyond any shadow of a doubt, that at the second meeting the membership gave full authority to the Executive to accept the company's proposal.

27. The precise question before the Board is whether the respondents have acted in bad faith contrary to section 60 of the Act. It is plain that at all important stages of the proceedings which commenced with the June 30th meeting with Inco, the respondents only acted after consultation with and following the approval of the membership. In such circumstances they cannot be said to have acted in bad faith and this is so no matter what might be said as to conformity or the lack thereof with internal union procedures or the provisions of section 63 of the Act.

28. In light of the fact that the respondents followed what they, with reasonable cause, saw to be the will of two membership meetings, they cannot be said to have been acting contrary to the provisions of section 60. On the basis of all of the evidence the Board finds that the respondents did not act in bad faith as alleged nor did they do anything that was arbitrary or discriminatory in their representation of the employees in the bargaining unit.

29. Mr. Millaire, as indicated earlier, took the position that the respondents, in the setting up of the Trial Board which resulted in his subsequent suspension by that Board, acted in a discriminatory and arbitrary manner toward him contrary to section 60 of the Act and that this was further evidence of bad faith on their part in the matter of the proposal.

30. Section 60 of the Act has been set out above. The section, it must be noted, relates to the question of union representation of employees within the unit. It is only where the abuse of the union's Constitution and Bylaws are shown to have brought about a breach of the duty of fair representation under section 60 that the Board will concern itself with such matters.

31. Nothing of that nature exists in the instant case. The charges which gave rise to the Trial Board and, of course, the decisions which it reached were all subsequent to the representation issue and did not affect its outcome. Furthermore, the Board cannot accept the proposition put forward by Mr. Millaire that the constitutional procedures set in motion by the respondents which resulted in his trial amount, as he suggests, to evidence supporting the allegation of bad faith with respect to the signing of the proposal.

32. In the result the Board finds that the respondents have not acted in bad faith as alleged and, further, that they have not acted in any manner that was arbitrary or discriminatory within the meaning of section 60 of *The Labour Relations Act*.

33. The complaint is accordingly dismissed.

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**1775-78-M** Labourers' International Union of North America, Local 527, Applicant, v. **John Entwistle Construction Limited**, Respondent, v. Employer Bargaining Agency, Intervener.

**Abandonment – Arbitration – Bargaining Rights – Reconsideration – Section 112a – Whether Board may reconsider section 112a decision – Board finding abandonment of bargaining rights – Whether Board exceeding jurisdiction**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and W. F. Rutherford.

**APPEARANCES:** *A. M. Minsky and M. Paperny for the applicant, A. M. Rock and D. N. Corbett for the respondent, G. Grossman for the intervener.*

**DECISION OF THE BOARD;** November 1, 1979

1. The applicant has asked the Board to reconsider and revoke its decision dismissing the applicant's referral of a grievance in the construction industry under section 112a of *The Labour Relations Act*. In that decision, [1979] OLRB Rep. March 211, the Board found that the bargaining rights on which the applicant was relying for the assertion of its grievance had been abandoned prior to the filing of this referral. The Board held hearings to receive the representations of the parties on the request for reconsideration and also to hear their arguments on the issues of law on which the applicant was relying to have the Board revoke its decision, should the request be granted.

2. Before dealing with the parties' representations, the Board deems it useful to summarize the facts on which the Board relied in its decision. The international, following certification by the Board on October 22, 1970, attempted and failed to negotiate a collective agreement with the respondent and, by virtue of a "no board" report issued by the Minister of Labour on May 19, 1971, was in a lawful strike position by June 4, 1971. From May 1971 until this referral, the only evidence of activity by the international or the applicant with respect to the respondent indicates that the international picketed three separate projects on which the respondent was engaged in 1971, 1973 and 1976 and also sought the co-operation of clients and potential clients of the respondent in not letting contracts to the respondent as long as it did not have a collective agreement with either the international or the applicant. The international had not given the respondent any notice expressing a desire to bargain or submitted any proposal that would form a basis for a collective agreement. Nor had it exercised any rights under the Act on its behalf or that of its members. During this same time the respondent continued in business, determining, without consulting with or getting the consent of the international or the applicant, the terms and conditions of employment of the employees in the unit for which the international was certified. In these circumstances, the Board found that the international had abandoned its bargaining rights with respect to the employees of the respondent.

3. The grounds upon which the applicant is seeking reconsideration are that the Board is without jurisdiction to terminate bargaining rights on a finding that a trade union had abandoned its bargaining rights and more particularly, in the alternative, that the Board made its decision in error because it did not have the opportunity to take into account the ef-



fect of the judgment of the Court of Appeal for Ontario in *Re Shopmen's Local Union No. 734 and Brayshaws Steel Ltd., et al*, [1972] 2 O.R. 549, and thus did not have before it when rendering its decision the full argument of the parties on this important point of law. Applicant counsel submitted that the parties have a right to argue fully before the Board on an important issue of law; that the Board should hear that argument and "take a second look at its decision".

4. The respondent argued that the Board, when sitting as an arbitrator, was *functus officio* when it rendered its decision in this matter in the first instance. The respondent contends, therefore, that the Board is without jurisdiction to reconsider its decision, i.e., the discretionary authority available to the Board in section 95(1) of the Act is not available to it in these circumstances. The Board cannot agree with this contention. While the Supreme Court of Ontario (Divisional Court) in its decision in *Master Insulators Association of Ontario, Incorporated*, July 18, 1979 (as yet unreported), did find that the Board, when proceeding under section 112a of *The Labour Relations Act*, was an arbitrator and thus excluded from Part I of *The Statutory Powers Procedure Act*, 1971, S.O. 1971, c. 47, it suggested that the Board could exercise its other powers under the Act in section 112a proceedings. This decision, in the Board's view, does not restrict it in any way from exercising the powers given to the Board under *The Labour Relations Act*, including the powers given to it by sections 92 and 95. Therefore the Board in this case has the authority to decide whether it should reconsider its decision.

5. The Board exercises its jurisdiction under section 95(1) of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

"Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously."

These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision.

6. Applicant counsel argued on three levels in support of its request that the Board revoke its decision. First, he continued to pursue the argument that the Board had exceeded its jurisdiction on the grounds that there was no statutory authority for the Board's policy of abandonment on which it had relied, hence it was without jurisdiction to apply it. Second, counsel argued that the Board's various decisions in respect of abandonment of bargaining

rights are inconsistent, some contradicting the one under reconsideration here, and thus raise the question of whether there is in fact a Board policy. Third, the Board was dealing with the referral of a grievance under section 112a of the Act, not an application for termination of bargaining rights, therefore, it should not have looked beyond the international's certificate and the international's authorization of the applicant to act for it; in doing so, not only was the referral dismissed but bargaining rights were terminated.

7. The applicant's first (and principal) argument is best summarized by referring, as applicant counsel did at the hearing, to his letter seeking reconsideration wherein he stated:

"... we request that the Board ... revoke its decision in this matter ... on the grounds that the Board has acted without or in excess of its statutory authority and jurisdiction under this Act by its observance of a policy concerning the 'abandonment of bargaining rights' and has thereby unlawfully terminated the bargaining rights for the subject employees held by Labourers' International Union of North America ('the Trade Union'). Simply put, the Board may only terminate a trade union's bargaining rights in accordance with the express provisions of the Act, namely, at the time(s), in the manner and for the reasons set forth in the Act and accordingly, the Board has no inherent or equitable authority to terminate the Trade Union's bargaining rights by application of a policy concerning the abandonment of bargaining rights, as it purported to do. ..."

Counsel elaborated his argument at the hearing by pointing out that the Act specifically provides for the termination of bargaining rights in sections 48 through 51. Section 48 terminates automatically bargaining rights existing under a collective agreement if the Board certifies another trade union to represent the same employees and no Board declaration is needed to effect the termination. The remaining sections require a declaration from the Board terminating bargaining rights whether a representation vote is held or not. Only section 49 makes any reference to what might be referred to as abandonment where, in subsection 5, it states: "... where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit." Counsel maintained, therefore, that the Board's authority to declare bargaining rights to be terminated is to be found only in sections 49 through 51 of the Act and it is only within the narrow meaning of section 49(5) that the Board might make such a declaration on a finding of abandonment. The applicant further contends that the Board may only terminate the bargaining rights of a trade union in accordance with the express provisions of the Act, since the Board has no inherent or equitable authority. In so stating, the applicant is relying on the decision of the Court of Appeal for Ontario in *Re Shopmen's Local Union No. 734 and Brayshaws Steel Ltd., et al, supra*, and the decision of the Divisional Court, in which it followed *Brayshaws*, in *Re Libby, McNeil and Libby of Canada Ltd., and United Automobile, Aerospace and Agricultural Implement Workers of America, et al*, (1978), 21 O.R. (2d) 340, reversed on procedural grounds, (1978), 21 O.R. (2d) 362 (C.A.).

8. The Board found in *Brayshaws Steel Ltd.*, [1970] OLRB Rep. Feb. 1297 that a collective agreement within the meaning of the Act was in existence between one trade union and an employer and then held that, because the agreement had been executed "in the



shadow of the organizing campaign” of a second trade union, the agreement was inoperative and thus not a bar to an application for certification from the second union. The Court of Appeal quashed the Board’s decision and at pp. 555 and 556 Jessup, J.A. held:

“The question therefore is whether the Board had the power to make the vitiating declaration that it did. No such express power is asserted but it is said that such a power is to be implied from the words in s. 5(1) of the statute, ‘are not bound by a collective agreement’. These words are said to empower the Board not only to find whether there is in existence a collective agreement within the meaning of s. 1(1)(c) and to find the employees affected by it but also to find, on the application of such equitable principles as the Board may think proper, whether the agreement is operative for any purposes. Clearly the Board has no inherent jurisdiction. Since its powers are statutory they must be found in clear language of necessary intention. In my opinion the only powers conferred on the Board by s. 5(1) are to ascertain whether a collective agreement within the meaning of s. 5(1) exists and to determine the persons such agreement affects; the words ‘bound by’ in s. 5(1) simply express the legal result of s. 37 [now s. 42] of the statute. That section binds the Board as well as the parties to a collective agreement. In my view the quoted words from s. 5(1) could read, in the same sense, ‘are not included in (or affected by) a collective agreement’. Where the Legislature has deemed it expedient for the Board to have power to render a collective agreement inoperative, it has granted the power by express words as in s. 45a(4) [enacted 1964, c. 53, s. 5; rep. & sub. 1970, c. 85, s. 20(2) (now s. 52(4))], an express grant of power which would be redundant if the Board has the equitable jurisdiction contended for. It is also significant that ss. 39, 42, 43 and 44 [now ss. 44, 48, 49 and 50] also expressly provide that, upon certain findings by the Board, collective agreements cease to operate.”

The Board, in *Libby, McNeil & Libby of Canada, Ltd.*, [1977] OLRB Rep. June 390, declared void a collective agreement from the time of a wage roll-back imposed by the Anti-Inflation Board. The Divisional Court quashed the Board’s decision and at p. 358 of the Court’s judgment, *supra*, it held:

“I am unable to find any difference in principle between the problem in the *Brayshaws* case and the one under judicial review here. The power of the Labour Board to declare an agreement to have been terminated or inoperative has been dealt with specifically in the following sections: ss. 40, 41(1), 42, 44(1) and (3), 49(6), 50, 52(4), 55(6)(a) and (b), 118(6)(a).

Nowhere in the statute is there found power given specifically to the Board to declare that a collective bargaining agreement valid and in force, is rendered null and void by reason of the ruling made under the anti-inflation legislation.

Section 95 does not aid the Board in this respect. That section does not



confer jurisdiction upon the Board but merely characterizes the jurisdiction and power which the statute otherwise confers.”

and at p. 361:

“In my view, however, the particular problem with which we are concerned here was one that should be dealt with simply on the ground that the Board has no jurisdiction to embark upon this consideration. This Board does not have residual, general, equitable or inherent jurisdiction and must operate within those specific powers given to it under its creating statute.”

9. The applicant contends that the Board has adopted the reasoning in *Brayshaws* in two cases and refused in them to apply its “abandonment” policy in factual situations similar to the case at hand. These are: *The Frid Construction Company, Limited*, [1975] OLRB Rep. March 146 and *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568. Applicant counsel cited also as authority that the Board has recognized that it has no inherent or equitable jurisdiction, the Board’s decision in *Christie, Brown & Company Limited, et al*, [1975] OLRB Rep. June 524 in which it stated:

“The Board has learnt through experience that it lacks jurisdiction to impose and remove bars to applications for certification unless expressly instructed by a fair interpretation of the legislation. Otherwise what may appear ‘equitable’ to one party will surely be viewed as ‘arbitrary’ by the opposite party.”

10. The applicant relied on the *Frid* and *Dravo* decisions also to support its second argument that the Board has been inconsistent in its decisions finding that bargaining rights have been abandoned to an extent that doubt is created as to the existence of a policy on abandonment. In *Frid, supra*, the Board was dealing with an application for certification in which an intervener had raised as a bar to the application a claim that it possessed bargaining rights by virtue of a subsisting collective agreement. The Board found that the agreement did not include bargaining rights for the employees affected by the application, but found that the intervener still held bargaining rights created by a certificate issued some 20 years prior to the application, stating as follows:

“There remains for consideration the question of whether intervener #2 currently holds bargaining rights for reinforcing rodmen quite apart from the provisions of the collective agreement referred to in paragraph 7 herein. The Board has not terminated the bargaining rights of intervener #2 with respect to reinforcing rodmen and since the decision of the Ontario Court of Appeals which was referred to in paragraph 22 herein, there is some considerable doubt concerning whether the Board may find abandonment of bargaining rights in this application. In the result, the Board finds that intervener #2 still possesses bargaining rights for reinforcing rodmen within the geographic area defined in the certificate issued by the Board on February 10, 1955.”

The decision of the Ontario Court of Appeals referred to therein is *re Brayshaws, supra*.

The Board's statement must be viewed in context with the other findings of the fact in the decision. It is evident from those facts that the conduct of the intervener and the respondent during the intervening 20 years would not support a finding that the intervener had abandoned its bargaining rights. In *Dravo* the Board was dealing with a question as to the authority of the Minister of Labour to appoint a conciliation officer under section 15 of the Act. One of the issues which faced the Board was a claim that the trade union which was seeking conciliation had abandoned its bargaining rights because four years had elapsed between the expiry of the collective agreement and the trade union giving notice to bargain. The Board found that the employer, who was in the construction business, had not employed any employees in the trade for which the trade union held bargaining rights during this period and, in setting aside the issue, stated: "... the Board is of the view that the facts set forth in the reference would not support a finding of abandonment of bargaining rights by the trade union."

11. In respect of his third argument, counsel for the applicant contended that it is a matter of evidence and record that the international had been granted bargaining rights by the Board (the Board's certificate dated October 22, 1970); then had exercised those rights (the "No Board" report dated May 19, 1971 issued by the Minister of Labour); and at no time prior to the Board's decision now under reconsideration had the Board entertained an application for termination of those bargaining rights. Therefore, when the Board was considering the applicant's section 112a referral and neither the respondent in its reply nor the intervener had challenged the applicant's bargaining rights, the Board should have dealt only with the preliminary issue of whether there was a collective agreement binding the applicant and the respondent. When the Board looked beyond the *prima facie* proof of bargaining rights to the question of abandonment, the result was that those rights were purported to be terminated by the Board relying on its policy concerning the abandonment of bargaining rights, a policy which the applicant contends is without any statutory basis.

12. Turning first to applicant counsel's able argument that the Board, in the absence of express authority in the Act, acted without jurisdiction in terminating the bargaining rights of the international, the Board, with respect, is unable to agree with counsel that the principles established by the Courts' decisions in *Brayshaws* and *Libby, McNeil, supra*, are applicable to this case. The Board has both the right and the responsibility to make findings of fact in any proceeding under the Act. In this case it made a finding of fact that the international had not exercised its bargaining rights between 1971 and the filing of this referral by the applicant. While this finding affected the bargaining rights of the international (an through it the applicant), it is not the Board which has acted to terminate the bargaining rights; rather, it is the international (and/or the applicant) which, by its failure to act, has voluntarily given up its bargaining rights. The Board, in a proceeding under section 112a of the Act wherein the applicant is relying on the international's bargaining rights, is finding as fact that those rights have been voluntarily abandoned. The Board's policy or principle of abandonment is the accumulated result of similar findings of fact in a variety of proceedings under the Act since the case of *Guelph Cartage Co.*, 55 CLLC ¶18,108 in 1955. See the Board's decision in *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110 at paragraph 4 for a review of some of the types of proceedings in which the Board has found on the facts that bargaining rights had been abandoned.

13. The applicant's contention that the Board has adopted the Court of Appeal's reasoning in *Brayshaws* in the Board's *Frid* and *Dravo* decisions is based, in respect of *Frid*, on



the quotation from that decision in paragraph 10 herein and, in respect of *Dravo*, from the statement: "The employer referred to several decisions of the Board which enunciated the proposition of the abandonment of bargaining rights by trade unions. Some of these decisions were written before (and some after) the decision of the Ontario Court of Appeal in *Brayshaws Steel Ltd. . .*". These statements are clearly situations in which the Board is stating, *obiter dicta*, that *Brayshaws* may cast some doubt on the principle of abandonment and are not adopting statements. The Board in each case made a finding of fact on the abandonment issue. In *Christie, Brown*, the Board was dealing with the request of an incumbent union to bar an application for certification by the Board using its jurisdiction in an equitable manner to import the "no raid" provisions of the Canadian Labour Congress' constitution. The Board rejected this request stating as quoted in paragraph 9 herein, then referred to the Board's exercise of "equitable" jurisdiction in its *Brayshaws* decision and the Court of Appeal's treatment of that decision. That situation is clearly distinguishable from the instant case wherein the Board is not purporting to exercise any equitable jurisdiction, but rather is making a finding of fact.

14. The Board, with respect, cannot agree with the applicant's argument that the Board's decisions in *Frid* and *Dravo* contradict the Board in this case and indicate an inconsistency in application of the policy of abandonment such that it creates doubt as to the existence of the policy. As the Board stated in *J. S. Mechanical, supra*, "Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, . . .". The facts in *Frid* and *Dravo* readily distinguish those cases from the instant one.

15. Turning now to the applicant's third argument, in its referral of a grievance to the Board, the applicant was attempting to assert rights which it claimed to have under a provincial agreement within the meaning of section 125(e) of the Act. In order to be successful in asserting this claim, the applicant not only had to prove that agreement (which was challenged by the reply filed by the respondent) but, in order to prove that the respondent was bound by that agreement through operation of section 134(2) of the Act, the applicant had to establish that it held bargaining rights for the respondent's employees. It was for this purpose that the applicant tendered in evidence the international's certification and the "No Board" report. The Board, faced with evidence indicating the possibility that bargaining rights were last exercised in 1971 and having regard to its experience over more than 20 years with fact situations in which trade unions have failed to exercise their bargaining rights, the Board itself questioned whether the international (and therefore the applicant) still possessed bargaining rights. If the applicant did not possess bargaining rights when it made its referral, the Board was without jurisdiction to hear the grievance. Applicant counsel's argument infers that even if he was not challenging the validity of the Board's policy of abandonment, the Board itself should not have raised an issue not raised by the parties themselves. With this we cannot agree on two grounds: on the evidence (or absence of it) which was before the Board at the time and on the Board's responsibility in any proceedings before it under the Act. Simply put, the evidence did not establish the existence of the applicant's bargaining rights at the time it was attempting to assert them. On the second point, surely even though it is a matter of Board practice generally that parties to proceedings before it conduct their own cases, it is elementary that the Board should require the parties to address any question which is essential to the Board's determination of the issues before it in those proceedings.



16. For all of the foregoing reasons, the Board finds no grounds for varying or revoking its decision and hereby reaffirms it.

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**1495-79-R** United Plant Guard Workers of America Local 1962, Applicant, v. McDonnell Douglas Canada Ltd., Respondent, v. Canadian Guards Association, Intervener.

**Collective Agreement – Document meeting statutory definition – Whether internal union constitutional irregularities causing Board to set aside agreement**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *R. Ross Wells, James Thomson and Watson Cook for the applicant; Robert McComb and James Dollery for the respondent; Pamela Sigurdson and D. Wittsie for the intervener.*

**DECISION OF THE BOARD;** November 27, 1979.

1. This is an application for certification.

2. The respondent and the intervener take the position that the application is untimely because of a subsisting collective agreement entered into on May 2, 1979 which continues to operate through to January 16, 1981. The applicant seeks to have the Board set aside the collective agreement on the grounds that the intervener failed to comply with its own Constitution in the process of ratifying the collective agreement.

3. There is no dispute that the intervener was certified by this Board on January 23, 1978 and that subsequent negotiations were conducted and culminated in the document referred to above. The applicant represents that the failure on the part of the intervener to comply with its Constitution relates to the intervener not swearing in or accepting persons as members of the intervener prior to holding a vote to ratify the collective agreement.

4. The Board made an oral ruling which it now confirms that the document submitted is an agreement in writing between an employer and a trade union representing employees of that employer containing provisions respecting terms or conditions of employment, and therefore a collective agreement within the meaning of section 1(1)(e) of the Act. No attack is made by the applicant as to any deficiency in the essential elements required to exist to bring the document within the meaning of section 1(1)(e) save that there may have been some constitutional irregularities on the part of the intervener preceding the execution of the document and that these render the document a nullity.

5. In our view these are not circumstances such as should cause the Board in this proceeding to enter on an enquiry. The manner of ordering and administering the internal affairs of a trade union in circumstances such as these, may found a claim by those affected,

namely the members of the trade union, in some other proceeding or some other forum but does not provide the Board with authority to find that a document which on its face clearly falls within the meaning of the statutory definition of a "collective agreement" is nonetheless not a collective agreement. We believe this conclusion to be well within the rationale of the case of *Brayshaw Steel Ltd.* [1972] 2 O.R. 549; 26 D.L.R. (3rd) 153.

6. The Board finds that the application is untimely and therefore is dismissed.

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**1207-79-U International Molders & Allied Workers Union, Complainants, v. Rehau Plastiks of Canada Limited, Respondent.**

**Discharge – Strike – Employer discharging grievor during lawful strike – Grievor attempting to damage company property – Whether activity lawful – No anti-union motive established**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

**APPEARANCES:** *Edward C. Witthames and Gordon Plancke for the complainant, D. I. Wakely, O. Braganza and D. Mueller for the respondent.*

**DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD AND BOARD MEMBER C. G. BOURNE; November 2, 1979**

1. In this complaint filed under section 79 of *The Labour Relations Act* the complainant has alleged that the grievor, Terry Riddell, has been dismissed by the respondent contrary to section 58 of the Act.

2. The facts in this case are few and relatively simple. The complainant began a lawful strike against the respondent September 7, 1979 for a first collective agreement. The grievor, who is chairman of the plant committee (a position he has held since the complainant was certified by the Board) and a member of the complainant's negotiating committee, was dismissed by the respondent on September 13, 1979 while participating in the strike. These are agreed facts, the remaining ones are derived from the evidence of the respondent's witnesses; none were called by the complainant.

3. The respondent had arranged through the organization providing security services at its plant to rent a van for the respondent and supply a driver for the van. The van was being used to transport non-striking personnel between their residences and the plant. On the night of September 12, 1979 there was an incident involving the van while it was stopped at a picket line at the entrance to the plant property. The grievor was observed by one of three policemen from the Prescott police force on duty at the picket line with his right hand on an object under the van's right front tire. It was a hard plastic object, pointed and shaped like a three-sided arrowhead approximately two inches to two and one-half inches high. It was attached to a flat rubber base approximately one-half inch thick and two and one-half inches square. As a result, the grievor was arrested by that policeman and charged with attempting to commit mischief by damaging and attempting to damage a tire of the van.

4. The next morning the plant manager, Mr. Braganza, received a report of the incident from the van driver and was informed of the grievor's arrest. Braganza contacted the chief of police and confirmed the grievor's arrest and charge. He spoke also to some of the employees who had been in the van as well as to the security guards who had been on duty inside the entrance gate. Next he conferred with two of his superiors and then decided to dismiss the grievor, which he did by letter dated September 13, 1979, which contains the following statement:

“This is to advise you that your services are being terminated effective today due to your illegal activities in attempting to damage Company property, for which you were arrested by the Police yesterday evening.”

While the grievor is the only employee who has been dismissed since the strike started, he is also the only employee who has been identified with an offence against company property or any other disciplinable act.

5. Section 58 of the Act protects an employee from dismissal or other retaliatory forms of action by an employer because the employee has exercised rights under the Act; particularly the right expressed in section 3 of the Act to be “... free to join a trade union of his own choice *and to participate in its lawful activities.*” [emphasis added] It is the grievor's right to participate in the lawful activities of his trade union which the respondent is alleged to have violated by its dismissal of the grievor. Section 58(a) of the Act prohibits an employer from refusing to continue to employ a person because the person was or is exercising rights under the Act. As stated by the Board in *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751, in paragraph 11, “These protections are activated by a finding of improper employer purpose – the existence of any element of anti-union motive constituting a breach of the statutory prohibition. Employee participation in the organization of a trade union need be only one of the reasons, and not the sole or primary reason, for employer conduct in order for that conduct to fall within the statutory prohibition.”. Therefore, if the grievor's dismissal was influenced by him being chairman of the plant committee, or a member of the union's negotiating committee or for engaging in lawful picketing on behalf of his trade union, the respondent's conduct would fall within the section 58(a) prohibition.

6. The Board's statement in *A.A.S. Telecommunications, supra*, makes it clear that, when the Board is determining whether there has been a violation of the employee protections in the Act, the critical element is whether the employer's actions contain any anti-union motive. It is not the Board's task in these types of complaints to establish if there is sufficient or just cause for the employer's actions. Therefore, while the employer, in coming forth with a credible explanation of his actions, may establish just cause for them, he must also satisfy the Board that there was not co-existing with the just cause the element of anti-union motive. In other words, just cause standing alone is not an adequate defense against an alleged violation of the employee protections in the Act. On the other hand, it may be reasonably construed from the Board's many decisions dealing with these types of cases, that the presence of union activity alone does not prove a complainant's allegations that the Act has been violated when that situation exists contemporaneously with an employer's impugned activity. When an employer has put forward a credible explanation for those actions, apparently free of anti-union motive, there must be other evidence which either



proves the presence of an anti-union motive or from which the Board may reasonably infer the presence of such motive. For this reason, the Board is usually presented with evidence from both parties and, as a result, is usually asked to draw opposing or competing inferences after assessing the evidence. In doing so, it may consider such factors as the presence of a pattern of anti-union activity by the employer, employer knowledge of union activity and the employee's role in it, the manner in which the employer's action with the employee was taken and the credibility of witnesses.

7. The respondent in the case at hand has given the Board a credible explanation for its dismissal of the grievor. That is, the respondent, when faced with evidence of the grievor's alleged attempt to damage company property, acted upon that evidence. That explanation standing by itself is free of any suggestion of anti-union motive. Even if the respondent had acted on incorrect information, that alone would not establish anti-union motive, although it might allow an inference to be made that the action was not reasonable. For the reasons given above, it is not the Board's task in this matter (as it would be the task of an arbitrator dealing with dismissal) to determine whether there was just cause for the grievor's dismissal. It is the Board's task, however, to determine whether the dismissal was influenced by any anti-union motive, including whether it was because of the grievor's union activity. Do the facts in this case support a reasonable inference that the respondent's actions were so influenced?

8. The parties are agreed on facts which establish that the respondent's actions were taken at a time when the respondent was aware that the complainant was on a lawful strike in an effort to achieve a first collective agreement and the grievor was participating in the complainant's picketing of the respondent's plant on September 12th, when the incident took place for which the grievor was arrested and charged with an alleged offense against the respondent's property. The respondent also knew that the grievor was chairman of the plant committee and on the complainant's negotiating committee. The complainant is asking the Board to draw the conclusion from these facts that the respondent used the expedient of the grievor's arrest to dismiss him because of his activities on behalf of the complainant. It would be sheer speculation for the Board to do so in the absence of any evidence which would cause it to either disbelieve the respondent's explanation altogether or infer the existence in the respondent's mind of an anti-union motive. There is no evidence of a pattern of anti-union activity. There is no evidence to suggest that the respondent, by its manner of dismissing the grievor, has singled him out from other employees for his union activity. In short there is no evidence from which the Board may infer reasonably that the respondent's dismissal of the grievor was influenced by any anti-union motive or by the grievor's union activity. The Board must conclude, therefore, that the respondent's reason for dismissing the grievor was devoid of any anti-union motive and there has been no violation of section 58.

9. The complaint is therefore dismissed.

10. Decision of Mr. M. J. Fenwick, Board Member to follow.

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**1123-79-R United Steelworkers of America, Applicant, v. Reliance Electric Limited, Dodge Canada Division, Respondent**

**Certification – Membership evidence – Employee threatening other employee for not supporting union – Threat occurring after more than 60% of employees have signed cards – Employee neither union official nor collector – Whether Board dismissing application – Whether vote ordered – Whether affecting validity of membership evidence**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members C. A. Ballentine and J. A. Ronson.

**APPEARANCES:** *Gerry Reeds and Mary Shane for the applicant; Edward T. McDermott for the respondent.*

**DECISION OF THE BOARD;** November 22, 1979

1. This is an application for certification.

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4. The applicant filed evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit. The respondent contends that the Board should give no weight to any of this membership evidence, but instead dismiss the application. In the alternative, the respondent submits that the Board should direct the taking of a representation vote among the employees in the bargaining unit.

5. The respondent bases its contention on certain statements allegedly made by Mr. Robert Cameron, a nineteen year old employee who at the time had been employed by the respondent for some three or four months. Mr. Cameron testified before the Board and denied having made the statements in question. However, in the context of all the evidence put before us, we are unable to accept the truth of these denials. The evidence we do accept is set out below.

6. On Thursday, September 13, 1979 Mr. Cameron approached a fellow employee, Mr. H. McDade, who is thirty-two years of age. Mr. Cameron stated to Mr. McDade that he had good news, namely, that a union was coming in. Mr. Cameron added that because of this fact he was not going to leave the company, and further, that a lot of good things were going to happen to everybody.

7. On the following day, Friday, September 14th, Mr. Cameron again approached Mr. McDade, and asked him whether he was for or against the union. Mr. McDade's reply indicated that he was not in favour of being represented by a trade union. Mr. McDade described what happened next as follows:

“He (Mr. Cameron) said it would be in my best interest to go along since they had an 80 per cent majority and if I didn't something tragic would happen to me.”

Mr. McDade's reply to this was that he did not want any part of the union. Mr. McDade never did sign a union card.

8. On Monday, September 17, 1979 Mr. McDade reported the events of the previous Friday to Mr. David Hoy, his lead hand. As it turned out Mr. Hoy is Mr. Cameron's uncle, and played some role in getting Mr. Cameron his job. Later that day Mr. Hoy confronted Mr. Cameron and asked him if he had threatened Mr. McDade. Mr. Cameron denied having done so, but Mr. Hoy in no uncertain terms indicated that he felt Mr. Cameron was lying to him. Mr. Hoy then warned Mr. Cameron that if he was advised by any other employee that he had been threatened the police would be called in.

9. After the exchange between Mr. Hoy and Mr. Cameron, Mr. Cameron again sought out Mr. McDade. Mr. Cameron warned Mr. McDade not to talk to Mr. Hoy again concerning Mr. Cameron's statements of the previous Friday. On or about September 18th Mr. McDade not only advised Mr. Hoy of this second encounter with Mr. Cameron, but he also informed Mr. Blair, a person who holds a managerial position with the respondent, of both his encounters with Mr. Cameron.

10. On the basis of these events we are satisfied that Mr. Cameron employed a threat in an attempt to get Mr. McDade to support the applicant and that he later tried to limit Mr. McDade's discussion of the matter. Mr. Cameron's actions in this regard cannot be condemned too strongly. The use of such threats, quite apart from being a clear violation of section 61 of the Act, simply has no place in a society such as ours. The question remains, however, as to whether or not Mr. Cameron's improper conduct should affect the weight to be given to the applicant's membership evidence.

11. Mr. Cameron testified that although he indicated his interest in having a trade union, he played no role in the union's organizing campaign. According to Mr. Cameron, unlike other employees who were approached to sign a union card, he had to seek out one of the employees organizing for the applicant in order to sign a card. He presumed that this was due to the fact that he was related to Mr. Hoy. There was no other evidence led concerning Mr. Cameron's involvement in the applicant's organizing campaign. Notwithstanding the lack of such evidence, counsel for the respondent contended that on the basis of Mr. Cameron's statements to Mr. McDade, the Board should infer that Mr. Cameron was actively involved in the applicant's organizing campaign.

12. Counsel for both parties indicated a willingness to have the Board examine the applicant's membership evidence in assessing Mr. Cameron's role in the organizing campaign. This membership evidence consists of cards which combine both an application for membership in the applicant union and a receipt for one dollar payment on account of initiation fees. Such a card was signed by 32 of the 45 employees in the bargaining unit. None of the cards were signed by Mr. Cameron as the collector of the dollar payment. There are no allegations of improper conduct on the part of those who did act as collectors.

13. The dates on the membership cards are of some interest. They indicate that 24 employees signed union cards on September 11, 1979, 4 signed on September 12th, 2, including Mr. Cameron, signed on September 13th (which was the date that Mr. Cameron advised Mr. McDade that he had "good news" about a union) and one employee signed on each of September 14th and 15th.

14. On the basis of the evidence before us we are not prepared to assume that the applicant assigned Mr. Cameron any role in its organizing campaign. Indeed, on the basis of



Mr. Cameron's enthusiastic comments on September 13th to Mr. McDade concerning the "good news" he had about a union, and the fact he only signed a union card on that date, it is reasonable to assume that his first contact with the applicant was on September 13th, that is, after more than 60 per cent of the employees in the bargaining unit had already signed union cards.

15. The Board will not accept membership evidence that has been obtained by intimidation or coercion. Further, where there is evidence that a union official has utilized a threat to obtain membership evidence from even one employee, then, in our view, the Board should be prepared to decline to give weight to all of the union's membership evidence out of a concern that the use of such threats might have been widely employed as an organizing tactic. Similarly, if there is evidence that an employee who approached employees with cards and acted as a collector utilized such a threat, it would be reasonable to discount all of the cards for which that individual acted as the collector. In the situation before us, however, we have neither of those situations. Mr. Cameron is neither a union official nor an employee collector. As already noted we are satisfied that the applicant assigned him no role at all in its organizing campaign. Accordingly, we are not prepared to assume that Mr. Cameron's reprehensible conduct can be treated as in any way indicative of how the applicant conducted its organizing campaign or of the approaches used by the collectors when getting employees to sign cards.

16. Although we are satisfied that Mr. Cameron's conduct cannot be linked directly to the applicant's organizing campaign, there remains the question as to whether any employees may have nevertheless been influenced by Mr. Cameron's conduct into signing a union card. Mr. Cameron made his threat to Mr. McDade. Mr. McDade, however, was clearly not intimidated by the threat. Not only did he not sign a union card, but he reported Mr. Cameron's actions to both his lead hand and to management. Two employees signed union cards on and after the date that Mr. Cameron made his threat to Mr. McDade. We feel it is quite likely that these two employees would have been aware of Mr. Cameron's threat to Mr. McDade prior to the time that they signed a union card. However, even assuming that Mr. Cameron's statements might have influenced their decision to sign a union card, and that accordingly their cards should not be given any weight, nevertheless, the applicant would still have filed acceptable evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit. Because of this we are unable to accept the respondent's contention that the Board should either dismiss the application or direct the taking of a representation vote.

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18. A certificate will issue to the applicant.

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**1246-79-U Canadian Chemical Workers Union, Applicant, v. Sheffield Bronze Powder Co. Limited, Respondent.**

**Consent to Prosecute – Application filed seven months after offence – Criminal prosecution barred – Consent not granted**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members H. Simon and F.W. Murray.

**APPEARANCES:** *Daniel Ublansky and William Adams for the applicant; D.I. Wakely, J.D. Gilfillan and others for the respondent.*

**DECISION OF THE BOARD;** November 16, 1979

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2. This is an application for consent to prosecute the respondent for alleged contraventions of *The Labour Relations Act*.

3. The respondent raised, by way of preliminary objection, that inasmuch as the commission of alleged contraventions were alleged to have taken place “on or about February, 1979” no prosecution could be carried under *The Summary Conviction Act* and the *Criminal Code* which in Section 721(2) provides that no such prosecution shall be instituted more than six months after the commission of the offense. The respondent further raised the objection that the allegations made in the application were deficient in particularity and that a request by it to the applicant to supply specific particulars had not been satisfied and that the respondent had therefore been unable to prepare its defense.

4. The Board dismissed the application by oral decision announced at the hearing and undertook to supply written reasons therefor. The Board’s reasons are here recorded.

5. The Board, in considering an application for its consent to instituting a criminal prosecution has uniformly taken the view that where no proceedings could be instituted in the Courts because of Section 721(2) of the *Criminal Code*, the Board would not exercise its discretion to grant consent to prosecution. For the Board to do otherwise would be to engage in obviously sterile proceedings. In the instant case the present proceedings were instituted some seven months following the time when the subject matter of a violation of the Act arose, and was scheduled for hearing some eight months following the alleged violation. It is evident that no proceedings can now be instituted in the Courts, and the Board therefore refuses to entertain the application.

6. In view of the Board’s decision above it is not necessary for it to express any opinion regarding the respondent’s objection relating to the adequacy of particulars supplied.

7. The application is dismissed.

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**1612-78-M Ontario Public Service Employees' Union, Trade Union, v. St. Clair College of Applied Arts and Technology, Employer.**

**Employee – Knowledge of pending terminations and amounts budgeted for projected wage increase – Whether employee under The Colleges Collective Bargaining Act**

**BEFORE:** Ian C.A. Springate, Vice-Chairman and Board Members J.D. Bell and H. Simon

**APPEARANCES:** *Joanne Miko and Martha Mercer-DeSantis for the trade union; Corinne F. Murray and Lynne Watts for the employer.*

**DECISION OF THE BOARD;** November 20, 1979

1. This is a referral under section 82 of *The Colleges Collective Bargaining Act* concerning the status of Ms. Betty Michaud. It is the position of the union that Ms. Michaud is an employee under the Act. The College contends that she is excluded from the scope of the Act and from the relevant bargaining unit.

2. The relevant provisions of the Act are as follows:

“82. If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause 1 of section 1 and the schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes.

1. In this Act and in the Schedules

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(f) ‘employee’ means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;

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(l) ‘person employed in a managerial or confidential capacity’ means a person who,

(i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,

(ii) spends a significant portion of his time in the supervision of employees;



- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (iv) is employed in a position confidential to any person described in subclause i, ii or iii,
- (v) is employed in a confidential capacity in matters relating to employee relations,
- (vi) is not otherwise described in subclauses i to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

## SCHEDULE 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

• • •

- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions, ...”

3. Following the filing of the referral, the Board appointed a Labour Relations Officer to inquire into the duties and responsibilities of Ms. Michaud. The report of the Labour Relations Officer consists primarily of a verbatim transcript of an examination of Ms. Michaud. Neither the college nor the trade union called any witnesses of their own to supplement or clarify the evidence of Ms. Michaud.

4. Ms. Michaud is classified as a Clerk 3. She is employed in the college’s planning and development department. Her immediate supervisor is Mr. Keith Studman, the college’s director of budgeting. It is agreed by the parties that Mr. Studman is outside the scope of the Act. There is nothing in the report to indicate that anyone else does work similar to that performed by Ms. Michaud.

5. Ms. Michaud does not supervise any other employees, nor is she involved in any way in the grievance procedure. It is clear that Ms. Michaud plays no role in determining objectives or policy for the college.

6. One of Ms. Michaud’s duties is to ensure that expenditures are properly identified

in regard to certain budget codes. At times she receives requests concerning non-wage budget adjustments. The example was given of a request to move money from one account to another so as to provide additional funds for instructional supplies. Ms. Michaud passes on such requests to Mr. Studman along with her recommendation as to whether or not the request should be granted. According to Ms. Michaud, Mr. Studman “pretty well” accepts her recommendations. We are satisfied that Ms. Michaud’s involvement with these matters is not sufficient to bring her within any of the exclusions set out in the Act.

7. Ms. Michaud has access to information showing the salary paid to all employees of the college. In our view this fact by itself is not sufficient to bring Ms. Michaud within any of the exclusions set out in the Act and, in particular, is not sufficient to make her a person employed in a confidential capacity in matters relating to employee relations. The union as the bargaining agent for the organized employees presumably knows, or can fairly easily ascertain, the salary of those employees it represents. As for persons excluded from the scope of the Act, their salaries cannot in any event be the subject matter of collective bargaining.

8. Ms. Michaud prepares a monthly report indicating actual variations from the amount budgeted for salaries for full-time staff. She does this by calculating the additional salaries of new staff and the decrease in salary payments resulting from the departure of staff members. We view this function, as well as certain other duties of Ms. Michaud, as essentially involving the performance of routine calculations, the results of which are passed along to others who utilize them in actually formulating budgets. Her duties in this regard are not, in our view, sufficient to make Ms. Michaud a person involved in “the formulation of budgets” such as to exclude her from the scope of the Act. In this regard we would adopt the following reasoning of the Ontario Public Service Labour Relations Tribunal when dealing with a similar provision in *The Crown Employees Collective Bargaining Act*. See: *The Crown in Right of Ontario*, File No. T7/76 (“The Dean case”):

“Again in that area we distinguish between being ‘involved ... in the formulation of budgets’ and mere involvement which simply entails supplying financial data and information or collating that data and information for subsequent use. Persons involved in the formulation of budgets are those who after receiving all the information, suggestions, projections and reports systematically reduce that information into an express budget. Those are the people that we consider to be managerial. They are the people, who in the final analysis, make the decisions as to how the government or its agencies will conduct their financial affairs and what priorities will be considered in determining both how government revenue will be raised and how government funds will be spent.”

9. In response to certain very leading questions from the representative of the college, Ms. Michaud indicated that Mr. Studman takes her into his confidence on budget matters. She did not, however, give any specific examples to illustrate the extent to which she is taken into his confidence. In giving the college’s representations as to the conclusions the Board should reach on the basis of Ms. Michaud’s examination, counsel for the college contended that Ms. Michaud fell outside the scope of the Act due to the effect of section 1(l)(iv), that is because she “is employed in a position confidential to any person described in subclause (i) (ii) or (iii).” Mr. Studman, the director of budgeting, would appear to be a person involved in the formulation of budgets and hence a person described in subclause (i).

However, in determining whether Ms. Michaud is employed in a position confidential to Mr. Studman we feel that the term “confidential” should be given a somewhat restrictive meaning so as to encompass only persons such as a private secretary, who of necessity is privy in a material way to much of the information to which his or her superior is privy, or an executive assistant who acts as an intimate policy sounding board to his or her superior and has substantial input into and influence on decisions of the employer. (See: *Durham College*, File No. 1185-78-M decision of the Board dated October 18, 1979 and *Sheridan College of Applied Arts and Technology*, [1976] OLRB Rep. Dec. 884.) It may be that Ms. Michaud is employed in either of these capacities. However, we do not regard a mere claim of confidentiality, without supporting examples, to be a sufficient basis to assume that section 1(l)(iv) applies. Accordingly, we are not prepared to find that Ms. Michaud is excluded from the scope of the Act on this basis.

11. Ms. Michaud indicated that she is responsible for analyzing teacher workload and assignment information. Using information obtained from the personnel department she breaks down the cost of courses on a “per capita basis” and then gives the information to Mr. Studman. Ms. Michaud indicated that if staff is to be terminated to meet budget guidelines she would become aware of both the number and names of persons to be terminated. Ms. Michaud stated that this knowledge would be shared only by the personnel department, Mr. Studman and herself.

12. Ms. Michaud prepares budgetary estimates with respect to salaries. It appears that her actual role in this regard is purely mechanical, namely applying a projected “across the board” percentage increase to existing salaries. Ms. Michaud described the percentage figure as an “inflation factor.” At one point in her examination Ms. Michaud indicated agreement when the representative of the union suggested that for bargaining unit personnel the percentage figure represented an amount already bargained for. However, from her answers to other questions it appears that the figure is an estimate for the upcoming year which may be struck prior to actual negotiations. On the basis of Ms. Michaud’s statements during her examination, and the lack of any other evidence to the contrary, we are led to the conclusion that this percentage figure is a confidential figure and is not generally known.

12. The fact that Ms. Michaud has advance knowledge of projected terminations for budgetary reasons, and knowledge of the percentage increase being budgeted for future wage increases, may well place her in a potential conflict of interest situation if she came within the bargaining unit. We are satisfied that this is the type of situation referred to in the following excerpt from the Dean case:

“There are also people who, in assessing the Government’s budget or an agency’s budget, are concerned with the amount of money that may be required to meet the payroll commitments as well as projected commitments that could arise through the collective bargaining process. To the extent that these people may possess information that may place them in a potential conflict of interest they should not be members of the bargaining unit. Such people if possessed of confidential information as to the Government’s intentions in dealing with its own employees should not be placed in the bargaining unit where potentially they could use their “insider’s” financial knowledge in bargaining with the Government. Persons with that type of knowledge will generally be ex-



cluded under the provisions of section 1(1)(m)(vii) [of *The Crown Employees Bargaining Act*] because they are employed in a confidential capacity in matters relating to labour relations.”

13. Having regard to this reasoning, we are satisfied on the material before us that Ms. Michaud is employed in a confidential capacity in matters related to employee relations and hence is outside the scope of *The Colleges Collective Bargaining Act*.

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**0786-79-U Ontario Nurses' Association, Complainant, v.  
Wellington-Dufferin-Guelph Health Unit, Respondent.**

**Duty to Bargain in Good Faith – Employer and union negotiating for three years – Union seeking arbitration resolution to impasse – No meeting for one year – Union making concessions and seeking further meeting – Employer refusing to meet – Whether violating section 14**

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members F.W. Murray and H. Simon

**APPEARANCES:** *Larry Robbins, Katherine Moore, Dan Anderson, Marianna Schroeder, Margaret Bowman and Lynda Galbraith for the applicant; James T. Heather for the respondent.*

**DECISION OF R.O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON;** November 5, 1979

**PART I**

1. This is an application under section 79 of *The Labour Relations Act* alleging that the respondent has failed to “bargain in good faith and make every reasonable effort to make a collective agreement.” The facts, although rather detailed, are not seriously in dispute.

2. The applicant has been the bargaining agent for the respondent’s employees for more than a decade. Bargaining rights were originally based on a certificate issued by this Board on March 20th, 1967 to the Nurses’ Association, Guelph Department of Health. Subsequently, the bargaining structure and the scope of bargaining rights were modified by a voluntary recognition agreement between the Board of Health of the Wellington-Dufferin-Guelph Health Unit and the Ontario Nurses’ Association, with which the predecessor union had merged. The parties have had a succession of collective agreements, the latest of which expired 30th April, 1976.

3. In February, 1976 the union forwarded to the employer notice to bargain and a list of its proposals for an amended agreement. Meetings were held in April and May and some progress was made with respect to wages and other benefits. There were two trade union proposals, however, which the employer was not prepared to accept and which the union, at

the time, was not prepared to modify. The union demanded "wage parity" with hospital nurses and that, in the event of a bargaining impasse *on the next set of negotiations*, the employer bind itself to submit the dispute to interest arbitration. On May 20th, 1976 the complainant applied for conciliation. A meeting was held with the conciliation officer on June 16th, 1976 and on June 23rd, 1976 a "No Board" report was issued. Seventeen days later the parties were in a legal position to strike or lock-out and the employer was legally entitled to alter the terms and conditions of employment. No strike or lock-out has occurred.

4. By letter dated July 28th, 1976 Katherine Moore, the trade union official who was responsible for the negotiations, wrote to the employer renewing an earlier request to submit the remaining items in dispute to arbitration. By letter dated July 30th, 1976 B.T. Dale, then the Medical Officer of Health and Director of the employer, advised that in the respondent's view the most sensible way of ending the impasse was a renewal of direct bargaining between the parties rather than resort to third party arbitration. It will be observed that at this point in time it was the employer who was seeking a negotiated settlement of bargaining disputes (present and future) while the union was advocating arbitration, for the remaining items in dispute on the current round of negotiations, and for any dispute which might arise out of the next round of bargaining.

5. The proposals for wage parity and interest arbitration were not unique to the respondent's bargaining situation but were, in fact, part of a co-ordinated bargaining policy which the Ontario Nurses' Association was then pursuing throughout the province. There were strikes in a number of areas over these issues and, at the same time, there was a concerted lobbying campaign in the media and with the Legislature designed to secure legislation compelling wage parity and interest arbitration. Bargaining with the respondent was part of this province wide strategy. The union was unwilling to negotiate a local agreement which might weaken its common front; and the employer was equally insistent upon bargaining a local settlement. As a result, the negotiations reached a stalemate.

6. By letter dated September 22nd, 1976 the union requested a further meeting with the employer and a meeting did occur, on October 27th. At that time the employer was prepared to improve its wage offer but rejected the union's request for interest arbitration and a signed memorandum recognizing an historical relationship between hospital nurses and public health nurses. Again, it is apparent that the wage parity and interest arbitration issues were the main impediment to a collective agreement. This was the crux of a letter from the respondent, dated 10th November, 1976 and addressed to the bargaining committee. That letter reads, in part:

"The prime outstanding issue in the negotiations from the view of the Association, appears the achievement of a compulsory arbitration provision. The position being taken by the Association and the one which they have held throughout negotiations here and elsewhere has, of course, serious political overtones. We believe that the resolution of this arbitration issue rests within the political forum and it should not therefore be used to withhold from you, our employees, the changes in benefits and wages which we have already offered, and to which you are entitled. The Board of Directors of the Health Unit and I, firmly believe that every effort must be made so that our employees do not become the pawns in this political game ..."

The letter went on to advise the employees that the employer intended to implement the last offer which it had made to the union. The employer also discontinued the check-off of union dues which it had been deducting since the expiry of the old agreement six months before.

7. In January, 1977 efforts were made to secure the assistance of a mediator but these efforts proved unsuccessful. On February 4th, 1977 the union was informed that the respondent was unwilling to meet so long as the interest arbitration issue remained outstanding. The employer felt that its position on the issue was clear and the union, because of its co-ordinated lobbying and bargaining strategy, still felt that it could not compromise.

8. Between February and August of 1977 the legislative lobbying campaign continued but it was becoming obvious that no legislative solution was likely. Accordingly, the union decided to return to the bargaining table and seek a negotiated settlement for the thirty-six bargaining units which had been involved in the campaign. It was decided that the demands for wage parity and compulsory interest arbitration should be abandoned.

9. On October 25th, 1977 Miss Moore wrote to the respondent to request further meetings. She explained that she had waited until the end of October because Dr. Dale had retired and the union wanted to give Dr. Aldis, the new Medical Officer of Health, an opportunity to familiarize himself with the organization. There had also been a change in the composition of the members of the Board of Health. Dr. Aldis advised the union that he would put the request before the new Board at the next meeting and, subsequently, he requested further information, in the following terms.

“The Board of Health has instructed me to request from you the specific items which are of concern to the Association. Following receipt of this information from you the Board will study the issues involved and recommend an agenda and some dates for the meeting with you. Might we also receive the telephone numbers at which you could be reached.”

The union replied that its position was not yet prepared for submission but that the information would be forwarded in about a month. By letter dated January 9th, 1978, Miss Moore forwarded to the employer the original union proposals for the 1976-77 agreement together with some further amendments which the union wished the Board to consider. Ms. Moore's letter did not indicate any alteration in the union's previous bargaining position. The copy of this letter, forwarded to the local bargaining committee, contained the added note directed to them, that Miss Moore had had an amicable conversation with Dr. Aldis about the matter. By letter dated January 13th, 1978 Dr. Aldis requested that Miss Moore advise the Board of convenient dates for a meeting.

10. A meeting was held on March 10th, 1978. At the meeting the trade union requested that the employer embody the existing *status quo* into a collective agreement which would be retroactive and run for approximately three weeks. This, of course, would immediately put the parties back into negotiations for another collective agreement, extinguish the right to strike/lock-out, trigger a new section 70 freeze, and make it necessary to go through conciliation once again. This was unacceptable to the employer. More significantly, the employer tabled a complete collective agreement for the union's consideration. This proposed agreement was broadly similar to the expired one, but it contained some significant changes from the old agreement which the union correctly considered an erosion of the



previous *status quo*. The employer proposals included a reduction in maternity leave, a modification of the illness allowance, a substitution of a voluntary check-off for the “Rand formula” and a modification of the recognition clause, so as to exclude “casual part-time” nurses from the bargaining unit. This would directly affect three employees, but could conceivably affect others. These persons had been covered by previous collective agreements but the employer apparently questioned the union’s right to represent them, having regard to the foundation of bargaining rights and subsequent changes mentioned above. It might be noted that the copy of the employer’s proposal (exhibit #16) filed with the Board is extensively annotated and indicates that a number of clauses were acceptable to the union and others were not. It is not clear who affixed these comments to the document, or whether the areas of agreement and disagreement were communicated to the employer. Another meeting was held April 27th, 1978, but no final resolution of the dispute was affected. The union was still insisting upon its earlier position which, by April 27th, would have resulted in a “3-day” agreement.

11. Two further meetings were held – on June 26th, 1978 and July 11th, 1978. At this time the complainant presented a composite group of proposals in collective agreement form, i.e., in the same form as the employer had presented to the trade union. These proposals consisted of the terms of the expired collective agreement together with amendments – including increases in wages – and a proposed term of May 1, 1978 to April 30th, 1979. The union refused to accept the employer’s proposal concerning union dues. Although the interest arbitration issue was dropped, the wage parity question was still on the table as was the recognition clause. The latter item had been broadened somewhat since the employer sought to exclude “part-time casuals” and clarify the status of certain other employees, including nurses who might be employed by the respondent in other than a nursing capacity.

12. The June 26th meeting was the most productive of any to that date. The union and employer were able to agree on many items, including the implementation of a Rand formula (providing the union could demonstrate that the majority of the employees supported this decision). Maternity leave, leave for union activities, the “recognition” question and money remained in dispute. At the July 11th meeting the employer took the position that the definition of the bargaining unit was a proper subject for negotiation. The union was concerned that one of the individuals who could be “bargained out” of the unit was the president of the local.

13. In late July, 1978 there was a mutual agreement to seek the assistance of a mediator and a meeting in the presence of a mediator occurred on September 18th, 1978. At that meeting there was considerable discussion but no final settlement. It was at the end of September, 1978 that Dan Anderson, the co-ordinator of the union’s “employment relations officers”, entered the picture. Miss Moore continued to assist him and prepared a summary of what she considered to be the items agreed to and the items remaining in dispute. No effort was made at this point to determine whether the employer’s perception of these matters was the same as that of the union.

14. On December 22nd, 1978, the Friday before Christmas, Mr. Anderson telephoned James Heather, a business consultant who had been advising the respondent. Anderson indicated that the union wished to pursue further negotiations and there was a brief discussion of some of the outstanding issues. Heather reiterated the employer’s position on monetary issues. The union’s position had moderated by that time, but Anderson testified

that he could not recall advising Heather of this. Anderson characterized the discussions as “exploratory” or “testing the waters.” The bargaining unit question was discussed, as was the term of the collective agreement. Neither Anderson nor Heather was prepared to commit himself. Heather proposed that he and Anderson meet to review the issues and try to determine whether “movement” was possible. Heather was unwilling to schedule a formal meeting between the two bargaining committees if, as had happened in the past, they merely “re-hashed” old issues. Heather thought that a meeting between the professional negotiators could clarify the matters remaining in dispute and explore the potential for compromise. In his view such discussion could lead to a more productive direct meeting of the full committees. This proposal was unacceptable to Anderson who was unwilling to meet unless the local bargaining committee was present. The conversation broke off after Heather agreed that a meeting could take place if the union showed significant movement. Anderson testified that he did not, at that time, suggest any specific concessions because he was not prepared to make any commitments without further discussion with the local bargaining committee.

15. A meeting with the local bargaining committee was not arranged until March 22nd, 1979, although Anderson tried to contact Heather on a number of occasions before this. Heather was finally reached, on March 30th, 1979 and was advised that, in the union’s view, there was room for substantial movement. Again, there was no specific discussion on areas of compromise. It was simply suggested that the union was “prepared to move.” Since Heather had had no recent instructions and was not certain that he was still retained as the employer’s spokesman, he suggested that Anderson write directly to Dr. Aldis.

16. By letter dated March 30th, 1979 Anderson informed the respondent of the union’s desire to resume negotiations and present its new proposals at a meeting with the respondent’s bargaining committee. The union proposed a date towards the end of April, 1979 when, it was expected, the wage rates for hospital nurses would be known. If this data were available, and the parties could agree in principle on the relationship between the rates of hospital nurses and public health nurses, it would be possible to calculate a specific monetary figure. The March 30th letter did not contain any specific proposals. Like the earlier conversation with Mr. Heather, the letter simply suggested that there was room to move.

17. The respondent acknowledged this new union initiative, but chose to refer the whole matter to a committee of the board for reconsideration and analysis. By that time it had been almost a year since the previous meeting, and almost three years since the expiry of the old collective agreement. By letter dated June 13th, 1979, the respondent indicated its willingness to review any written, modified position that the union might wish to make and, in response, the union forwarded its latest submission. It appears from an internal union memorandum, dated May 23rd, 1979, that had the employer not been willing to resume bargaining, the union had decided to bring a “good faith bargaining” complaint before this Board. This would be the second such complaint. In November, 1978 a complaint was filed and subsequently withdrawn, on the understanding that the employer was prepared to resume bargaining – as it later turned out, only if the union was prepared to modify its demands.

18. By letter dated June 21st, 1979 the union sent to the employer its modified proposals, together with a copy of the Kingston General Hospital award which “set the pattern” for wage rates in the hospital industry. The union also enclosed Miss Moore’s memo-

random setting out her understanding of the items settled and those remaining in dispute. Anderson testified that these proposals were the extent of the concessions which the union was prepared to make in order to get an agreement, but he was confident that this new initiative would be successful. He was wrong. The employer responded to the union's overture with the following letter.

"Re: Your letter of June 21, 1979

Wellington-Dufferin-Guelph Health Unit

The Board of the above Health Unit has asked me to acknowledge your letter and to comment upon both your modified proposals and what you have been led to believe was agreed during distant negotiations.

I have carefully read what you have term "modified" proposals and find, to my surprise, that in fact, after checking my notes both prior to and at both conciliation meetings, your position, as expressed, is unchanged. True, some minor issues, two in number, which were outstanding at the second conciliation in September last, do not appear on your sheet, but all else remains unchanged.

Enclosure #2, headed "Items agreed etc." is totally inaccurate. Many of the items were in fact never discussed, others are still outstanding (e.g. Article 4) according to your own accounting and we do not agree with the rewritten articles.

In view of these facts, I am instructed to advise you that the Board can see no purpose in continued dialogue on these positions.

May I suggest that verification of what your position was at last September can be obtained from the conciliation officer assigned to this case."

19. The reason for the most recent impasse is readily apparent. Mr. Anderson testified that in his view a union concession involves a retreat from its original bargaining demand, or a return to the *status quo* of the previous collective agreement, but never below that position. The employer, on the other hand, was dissatisfied with some of the terms of the old agreement and, although it was prepared to improve wages and certain other benefits, it also sought amendments which the union would necessarily regard as an erosion of the rights which the employees had enjoyed under the old agreement. The union's approach is reflected in its "new proposals" which consist of items which, in the union's view, had been already settled, items which maintained the language of the previous collective agreement, and items which represent an unequivocal improvement in benefits. Yet in proposing a return to the old agreement provisions respecting matters such as the "banking" of sick leave credits, the union was seeking to maintain a benefit which the employer was determined to eliminate. Anderson testified that he could not recall whether he considered the employer's proposals when he was drafting those of the union.

20. Following the receipt of Mr. Heather's July 18th letter, the union filed the present complaint. No further effort was made to contact Mr. Heather in order to clarify what the



employer considered to be a “misunderstanding” concerning the matters which had already been agreed to.

21. The union contends that the employer’s failure to bargain in good faith is demonstrated by its pattern of conduct over three years, which includes: “regressive” proposals, persistent failure to explain the reasons for its proposals, the attempt to alter the scope of the bargaining unit, “stalling” and, in recent months, a refusal to meet when the union has indicated its willingness to make concessions. The union seeks a declaration that the employer has bargained in bad faith and a series of directions which will prevent the employer from “reneging” on matters previously agreed to and require it to return to the bargaining table with the assistance of a mediator and abandon the bargaining unit issue.

22. The respondent contends that the recognition issue is not a stumbling block to a collective agreement and, indeed, is no longer on the table. The respondent argues that its conduct does not reveal either bad faith or an unwillingness to reach a collective agreement. It is simply that the agreement which the employer is prepared to sign is less generous than that which the union is presently prepared to accept. The respondent submits that the Board should be wary of judging the adequacy of a party’s concessions and, in any event, in the circumstances of this case, the respondent was not acting in bad faith when it refused to engage in further meetings with the union.

## Part II

22. The duty to bargain in good faith has been part of the collective bargaining law of the Province of Ontario since 1944. Its present statutory formulation imposes two requirements:

- (a) to meet and bargain in *good faith*;
- and
- (b) to make *every reasonable effort* to make a collective agreement.

The first requirement refers to the parties’ state of mind or motivation. Essentially it requires negotiations with the shared intention of achieving agreement. The second part of the statutory duty requires that there be a significant commitment of time, effort and energy in the pursuit of this shared objective. There is an obligation to follow a procedure which will increase the prospects for a negotiated agreement, and will minimize the likelihood of industrial conflict. Of course, it is undeniable that the use of economic power underlies the collective bargaining process. There is no inconsistency between a genuine desire to come to agreement and reliance upon one’s economic power to get the kind of agreement one desires. Section 14 is not intended to equalize bargaining power, nor is a party with superior economic leverage prohibited from “hard bargaining” in pursuit of his own economic advantage. The Board does not sit in judgment on the reasonableness of the parties’ position, or impose its own notions of fairness upon them. On the other hand, if the Board is not to be blinded by empty talk and the mere surface motions of collective bargaining, it must take some cognizance of the substantive positions taken by the parties in the course of their negotiations. As a practical matter, it will be difficult to demonstrate that one has bargained in good faith and made every reasonable effort to make a collective agreement if one has rig-

idly adhered to a position for which there is no apparent rational justification. One cannot really divorce the parties' bargaining behaviour from the substantive positions which they have taken and, in making its section 14 determination, the Board may be influenced by both. The real problem is to fashion a standard of "good faith" and "reasonable efforts" which does not impair the consensual aspect of the bargaining process or encourage parties to seek, through litigation, what they have been unable to achieve at the bargaining table.

23. In the present case, the negotiation process extends over three years. Did the respondent enter negotiations with the shared intention of achieving a collective agreement? On the basis of the evidence we are satisfied that it did. Indeed, the employer continued to press for a collectively bargained settlement of the matters in dispute, while the union was insisting on arbitration, and conducting its campaign in the press and the political forum. Had the union been more willing to negotiate at that time, the parties might well have achieved an agreement. No doubt, in retrospect, the union made a tactical error in abandoning the local bargaining table, but to the extent that it gave precedence to provincial or political considerations, it is the author of its present dilemma. It hardly lies in the mouth of the union to complain of the respondent's "stalling" when, at various times since the expiry of the old agreement, the union allowed months to pass without making any effort to make contact. Throughout most of 1977 the union seemed more concerned with its legislative objectives than a collective agreement and, even more recently, three months passed between Mr. Anderson's renewed contact with Mr. Heather (December 22, 1978) and a meeting with the local bargaining committees to discuss possible compromises (March 22, 1979). Even then it would appear that the union did not provide the employer with the details of its modified proposals until June of 1979. Mr. Heather offered to meet with Anderson to explore the possibility of compromise, avoid misunderstandings, and pave the way for a direct meeting. This offer was rejected. These events, while understandable, do not evidence any urgent desire to resume negotiations and, in the circumstances, we cannot find fault with the employer's approach to the matter. Nor can we find that the employer's proposals were "regressive" or calculated to frustrate the negotiations. The evidence reveals that considerable progress was made in the direct bargaining. A number of matters (for example, union security) were settled, and the employer is fully entitled to strike a hard bargain and hold out for an agreement on terms more closely corresponding with those which it proposed (Exhibit #16). Moreover, after the passage of three years, and having regard to the changing economic environment, the employer is entitled to re-appraise and reformulate its earlier position – provided it is acting *bona fide* and is not injecting items at the "eleventh hour" as a means of avoiding agreement (see *Graphic Centre Ont. Inc.*, [1976] OLRB Rep. May 221, and *Board of Health of Haliburton*, [1977] OLRB Rep. Feb. 65).

24. The bargaining unit issue poses more difficulty involving, as it does, the allegation that the respondent has sought to force the union to give up its statutory right to represent certain employees in the unit. This issue was discussed in *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776 where the Board found that a trade union could not strike to force the inclusion of employees in a bargaining unit. Although the Union and employer could voluntarily agree to their inclusion, the Board found that this issue could "not be pressed to an impasse", i.e., made the subject of a strike. Similar reasoning (and language) was employed by the Board in *Toronto Star*, [1979] OLRB Rep. Aug. 811, where the Board characterized the employer's conduct as an attempt to circumvent the jurisdictional dispute provisions of the Act. It is contended that the present case is the reverse of the situation in the *Carpenters* case, *supra*, but we need not comment on that case



because we are not persuaded that the bargaining unit issue was “pressed to an impasse.” No strike or lock-out was imminent nor are we satisfied that this issue was the real stumbling block to an agreement or that “but for” the employer’s insistence on this issue there would have been an agreement. The union was entitled to refuse to discuss the matter and require the employer to move on, but we are not convinced that the union did take this unequivocal position. One might wonder why, after so many years, the employer raised the matter, and left it “on the table” in face of the obvious opposition on the union; however, as at the date of the hearing, it was no longer “on the table” and we need not consider it further. Had we been satisfied that the employer was adamantly insisting on restructuring the unit or was directly, or indirectly, making either an agreement or a major concession conditional on the union’s acceptance of its position in this matter, we would have found a breach of section 14.

25. We turn now to the final item upon which the union relies: the refusal to meet when the union made some movement, indicated its willingness to make concessions, and set out its understanding (with which the employer apparently disagreed) of the items agreed to and in dispute. Here different considerations apply, since it is not just a matter of “good faith” but also whether the employer has “made every reasonable effort to make a collective agreement.”

26. It is clear that the expiry of the conciliation process or the occurrence of a strike does not extinguish the union’s bargaining rights or the parties’ obligation to bargain in good faith – although the contents of the duty to bargain may change. The Board in *New Method Laundry*, 57 CLLC ¶18,059, put it this way:

“Although the obligation to bargain is not extinguished when the time limit set in section 49 has come to an end, the nature and extent of the bargaining in which a party is required by law to engage at that point may be quite different from what they were earlier. It is impossible to spell out in detail what an employer or a trade union will or will not be required to do at that stage in order to comply with section 11. Each case will turn on its own peculiar facts and there is little profit in seeking to set out my views on what must of necessity be a series of hypothetical situations. Some of the factors which will have to be taken into account will probably be whether one of the parties has requested the other to resume negotiations, whether the party making such a request has indicated that it is prepared to make significant concessions, whether a strike or lock-out is in progress and similar matters.”

That case involved an attempt to pursue negotiations after the commencement of a bitter strike, but we believe the principles espoused are equally applicable here. The Act does not require that a party engage in fruitless marathon discussions at the expense of a frank statement in support of his position, but as Professor Cox commented:

“Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strength and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other’s convictions. The



cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion.”

27. In the present case there has been no collective agreement between the parties for three years and no meetings for more than a year. It is not clear whether there have been any direct negotiations involving the new members of the Board of Health and the union’s negotiating committee. An employer who has been without a collective agreement for three years probably has little incentive to conclude one now; but this does not relieve him of his obligation to bargain. There has been a change in the circumstances and identities of “the players” and the union has recently indicated that it is prepared to make concessions. The union has not retreated to a position below the 1975-76 agreement, but it has retreated to some extent, and seeks further direct negotiations. In our view an employer who had a real intention of concluding a collective agreement (albeit one on terms favourable to him) and who was “making every reasonable effort to make a collective agreement”, would have met with the union to explore the possibilities for compromise. We are satisfied, therefore, that in this respect, and in this respect only, the employer has failed to comply with its statutory duty. We therefore direct that the parties meet forthwith to consider their respective positions.

#### **DISSENTING OPINION OF BOARD MEMBER F. W. MURRAY:**

1. I dissent.

2. I have had the opportunity to consider the majority decision and, while I agree with many of the statements which are made therein, I cannot agree with the conclusion.

3. Prior to the present round of negotiations the union and the employer have had a long and, apparently, amicable bargaining relationship. Bargaining began in the spring of 1976 and there have been at least seven direct meetings, as well as numerous exchanges of correspondence. There is not the slightest suggestion that the employer has refused to recognize the union or discuss its proposals. Indeed, in the early months of negotiations it was the union which was unwilling to negotiate – preferring to abandon the bargaining table and conduct its campaign in the press. Such conduct inevitably undermines bargaining and is hardly conducive to an amicable resolution of the matters in dispute.

4. Section 14 of the Act does not require the parties to engage in fruitless discussion. There is ample evidence here that the employer has made a reasonable effort to compose his differences with the union and that the parties have been partially successful in this regard. The reasonableness of the employer’s effort must be viewed in context. Surely the present negotiations have progressed to the point where the employer is entitled to insist on a significant concession or, at least, a real consideration of the employer’s position. Yet Mr. Anderson could not remember whether he even considered the employer’s proposal when drafting his own. This is the second complaint which the union has brought, and I am seriously concerned lest applications to this Board become part of the bargaining process, or a tactical manoeuvre to which parties resort in an effort to achieve further concessions. This is not the purpose of section 14.

5. Having regard to the totality of the evidence, I am satisfied that the respondent has bargained in good faith and made every reasonable effort to make a collective agreement. Accordingly I would dismiss the application.

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**0184-79-R United Steelworkers of America, Applicant, v. Westeel-Rosco Company Limited, Respondent.**

**Appropriateness – Bargaining Unit – Applicant attempting to carve out one department – Relevant factors reviewed**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members H. Simon and E. C. Went.

**APPEARANCES:** *Victor Solomatenko and Mary Shane for the applicant; R. C. Fillion, B. Smeenk and other for the respondent.*

**DECISION OF THE BOARD;** November 26, 1978

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The applicant union applied to represent all employees of the Printing and Advertising Department engaged in printing, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.
4. The bargaining unit described by the applicant encompasses all persons below the rank of supervisor in the Printing and Advertising Department except for the secretary. It includes, therefore, the bindery clerk, the bindery clerk-fast copy operator, the varitype-phototypesetter and three pressmen. The fourth pressmen is a working foreman. The respondent claims that he exercises managerial functions and should be excluded from the unit while the applicant contends that he is an employee for the purposes of the Act and would therefore fall within the proposed bargaining unit. The parties have agreed to set aside the matter of his employment status until the Board has determined whether the bargaining unit applied for the applicant is appropriate.
5. The respondent, a manufacturer of fabricated metal products, has two locations in Metropolitan Toronto. The one housing the Printing and Advertising Department applied for by the applicant is located at 1 Atlantic Avenue in Toronto and includes as well the head office, Ontario Region Administrative Activities and a warehouse. The other facility is a manufacturing complex located in Rexdale. The hourly rated employees at both the Rexdale plant and the warehouse employees at 1 Atlantic Avenue are represented by the United Steelworkers of America in one bargaining unit.
6. There are some 14 departments at the 1 Atlantic Avenue location consisting, below the rank of supervisor, almost exclusively of salaried persons who would fall within the broad category of "office, clerical and technical employees". There is a Computer Department, for example, comprised of systems analysts, programmers, keypunch operators, computer operators, secretaries and clerical personnel. There is an Engineering Department composed of engineers, technicians, clerks, draftsmen and secretaries. Other departments such as Manufacturing Services, Office Services, Internal Audit, Cubic Storage, Design and Drafting, Personnel, Purchasing, Treasurer and Controller Departments include, among

other categories of employees, accountants, analysts, clerical personnel, secretaries, auditors and inside sales persons.

7. The applicant seeks to carve most of the Printing and Advertising Department out of this complex on the grounds that the Department is separate and distinct from the other departments in that the persons employed therein exercise specialized skills and have a separate community of interest because they are essentially production employees rather than office, clerical or technical employees. Counsel for the applicant argues that instead of providing a support service they produce a product which would otherwise have to be purchased by the respondent.

8. Counsel for the respondent, on the other hand, contends that the bargaining unit applied for by the applicant is inappropriate because the employees therein do not share a separate community of interest. The respondent is concerned that to carve one department out of the fourteen others would unduly fragment the respondent's operation and fears it would set a precedent for a further break up of its operation if later a union seeks to carve out one of the other departments. The respondent asserts that the persons in the unit applied for fall within the description "office, clerical and technical employees" and claims that the appropriate bargaining unit would encompass all office, clerical and technical employees of the respondent at both of its existing locations in Metropolitan Toronto. We note the applicant's agreement that if the Board concludes that the unit applied for is inappropriate it would be content with an office, clerical and technical unit spanning both locations.

9. The Board summarized the principles it utilizes to determine the appropriateness of a proposed bargaining unit in its decision in *Canadian General Electric Company Limited*, [1979] OLRB Rep. March 169.

"The Board's primary concern in evaluating the appropriateness of a suggested bargaining unit is that the unit represent a viable collective bargaining entity. In assessing the suitability of a proposed unit, the Board is generally guided by two counter-balancing concerns. Firstly, having regard to the proposed unit itself, the Board looks to whether the employees involved share a sufficient community of interest to constitute a cohesive group which will be able to bargain effectively together. Secondly, looking to the employers's operation as a whole, the Board assesses whether the proposed unit is sufficiently broad to avoid excessive fragmentation of the collective bargaining framework. A proliferation of bargaining units is not normally conducive to collective bargaining stability. Not only may it place significant strains on an employer who would be required to bargain with each group, but also it may hamper the employees' ability to bargain effectively with the employer. Under the umbrella of these two guiding principles, the Board seeks to give effect to an equally important concern: the freedom of association guaranteed to employees in section 3 of the Act. As with all freedoms, the principle of freedom of association is not unbridled and must be blended with the Board's responsibility to establish an effective collective bargaining structure."

10. In its balancing process aimed at insuring that there is a community of interest



among persons in a proposed bargaining unit while at the same time avoiding undue fragmentation of the respondent's business, the Board has found that, as a general rule, a unit consisting of one classification or one department is inappropriate. See *Canadian General Electric Company Limited*, *supra*, and the numerous cases cited therein as examples of the Board's reluctance to carve out separate groups. In *Canadian General Electric*, the Board held that a bargaining unit limited to cost estimators and cost analysts was inappropriate as it was but one segment of a larger category of persons classified as "Management and Professional – Individual Contributors" consisting of such additional classifications as buyers, value analysts, marketing and engineering assistants and computer and finance personnel. As well in *H. Paulin & Co.*, [1979] OLRB Rep. April 335 the Board held that the bargaining unit proposed by the applicant which was limited to one of the divisions in the corporation was inappropriate notwithstanding discernible differences between the groups of employees.

11. In the exceptional circumstances where the Board has found a separate department to be an appropriate bargaining unit the Board has been satisfied that the segment was a separate and distinct group functioning as an independent entity. In *Ex-Cello-O-Corporation of Canada, Limited*, [1974] OLRB Rep. Aug. 543, the Board held that the Drafting and Engineering Department was an appropriate bargaining unit because it operated as a functionally independent entity. In reaching its conclusion the Board emphasized its geographic separation, the employees' authority to deal directly with the customers, the difference in their hours of work and the absence of any evidence of interchange between these employees and the remainder. In *The Governors of The University of Toronto*, [1969] OLRB Rep. Feb. 1149 the Board held that a unit consisting of all non-professional employees of the respondent employed in libraries within the jurisdiction of the University of Toronto library was appropriate. In concluding that the library operated as a functionally independent entity the Board emphasized that it prepared and administered its own budget, that it had the ultimate authority to hire, promote, transfer and discharge library employees and that an interchange of employees between the library and other departments was a rare occurrence. In *The University of Western Ontario*, [1972] OLRB Rep. Dec. 1038 the Board, with some reluctance but recognizing the weight of precedent, also held that a unit composed of all non-professional employees of the respondent's libraries was appropriate. The Board emphasized the size and nature of the library as a self-contained administrative unit and its ability to function as an independent entity. The Board warned, however, that its decision should not be used as a precedent for splitting the University into bargaining units along administrative lines and noted with approval its decision in *Queen's University at Kingston*, [1972] OLRB Rep March 267 where it found that the Public Relations Department was not an appropriate unit. We note that subsequently, in *McMaster University*, [1973] OLRB Rep. Feb. 102, the Board distinguished the *University of Toronto* and *University of Western Ontario* cases and refused to find that a unit of all non-professional library employees was appropriate.

12. If the applicant were a craft union applying for a craft unit pursuant to section 6(2) of the Act different considerations would apply and the specialty of the skills and the historical bargaining relationship would be given special recognition which would counter-balance the Board's usual concern for undue fragmentation. As it is, however, the applicant is not a craft union and asserts that it is not applying for a craft unit. The appropriateness of the proposed bargaining unit, therefore, must be measured by the Board's normal standards.

13. The specialty of the skills exercised by some of the persons in the proposed bargaining unit such as the pressmen is acknowledged but outside a craft unit cannot alone justify a separate bargaining unit. (See *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459 and *Canadian General Electric Company Limited*, *supra*.) If specialization of skills were alone sufficient to justify a separate unit the respondent could be faced with a proliferation of bargaining units relating to draftsmen, accountants, computer technicians, and numerous other groups.

14. The applicant argues that the unit applied for is essentially a production unit and that the employees do not therefore share a community of interest with the other salaried employees who would fall into the classification of office, clerical and technical employees. To highlight the production nature of the Printing and Advertising Department and therefore its uniqueness among the departments at 1 Atlantic Avenue, counsel for the applicant emphasized the high noise level in the printing room, the casual and protective clothing worn by the employees and the unfinished ceiling in the printing room. The evidence indicates, however, that the noise level in the computer room is similarly very high and that persons in the drafting, engineering and computer departments also wear casual or protective clothing. In the circumstances the unfinished ceiling cannot persuade the Board that the Printing and Advertising Department is a production operation.

15. There is a production unit already in place which spans the respondent's two locations in Metropolitan Toronto and is defined as follows:

“All employees in Metropolitan Toronto save and except foremen, those above the rank of foreman, office and sales staff, and those engaged in outside erection work.”

If the persons in the proposed unit were essentially production employees, they would fall within the above defined production unit. But the applicant agrees that they do not come within the parameters of the production unit. As they do not, they must fall within one of the exceptions. The applicant does not dispute the respondent's assertion that the only feasible classification excluded from the production unit which could encompass the Printing and Advertising personnel is “office” employees. The Board agrees with the respondent's deduction and is satisfied that it provides a complete rebuttal to the applicant's characterization of the persons in question as essentially production employees. The Board further agrees with the respondent's contention that the employees in question fall within the group of office, clerical and technical employees.

16. We turn then to consider whether the bargaining unit proposed by the applicant which we find consists of office, clerical and technical employees forms a group sufficiently separate and distinct from the other office, clerical and technical employees of the respondent to comprise an appropriate bargaining unit.

17. Unlike the facts in *Ex-Cell-O*, *supra*, *University of Toronto*, *supra*, and *University of Western Ontario*, *supra*, the physical location of the Printing and Advertising Department is integrated with the other departments and not isolated. At 1 Atlantic Avenue the Department does not occupy a separate corner; instead its facilities are spread out between a portion of the warehouse and three separate rooms with some distance between them.



18. The work produced by the Printing and Advertising Department is for the respondent's internal use. Most of the material printed is either promotional literature or for the benefit of the employees themselves, such as the employees handbook. Mr. R. W. Chappell, Human Resources Manager, described the work of the Printing and Advertising Department as a service to the various departments in the company and a service to which all departments have equal access. Unlike the facts in *Ex-Cell-O, supra*, therefore, the Printing and Advertising Department is tied to the other departments through the very material they produce. Instead of producing something for external consumption they provide a service used by all the other departments.

19. The link between the Printing and Advertising Department and other departments is further evidenced by the duties, of some of the people in the proposed bargaining unit. Gus Calderone, a bindery clerk and fast copy operator, is responsible for keeping the photocopy machines in the copy room filled with paper and is further charged with doing whatever he can to keep the machines in working order. The copy room is not part of the Printing and Advertising Department and contains photocopy machines available for the use of all departments. Calderone estimates that he spends five to ten minutes a day carrying out these duties. In his absence, Frank Tonna, another bindery clerk, performs the job. Calderone's duties bring him into further contact with the other departments as everyday he delivers the finished material from the Printing and Advertising Department to the mailroom. Additionally, approximately once a month, he makes deliveries directly to other departments in the building.

20. Mirella Marnica, a varityper and phototypesetter is in the proposed bargaining unit. After Mr. Dowsette left in September, 1978 Marnica assumed some of his duties which were continuing at the date of application and gave her increased contact with persons from other departments. When another department wants a job done by the Printing and Advertising Department Marnica is contacted and she writes out the job ticket indicating the particulars of the request. She is the person who provides the departments with progress reports and tells them when their job is completed. She further testified that she has regular contact with the secretary of the Printing and Advertising Department who was not included in the proposed bargaining unit.

21. Ties between the Printing and Advertising Department and the others are also visible through inter-departmental transfers involving positions in the Printing and Advertising Department. Marnica, for example, transferred into the Printing and Advertising Department as varityper from a secretarial position in the Building Products Department. In reverse order, Monique Gignac transferred out of the Printing and Advertising Department as a varityper and into a secretarial classification in the Purchasing Department. Marnica testified that operating the varityper and phototypesetter in the Printing and Advertising Department is essentially a typing function suggesting that there is minimal difficulty in transferring someone from that position to a secretarial classification in another department and vice-versa as reflected in the above examples. In this respect the facts of this case are distinguishable from *Ex-Cell-O, supra*, and *The University of Toronto, supra*, where an interchange of employees between persons in the proposed units and other departments was either a rare occurrence or did not happen at all.

22. Chappell testified that the terms and conditions of employment are basically the same for all salaried employees and do not vary along department lines. The persons in the



proposed bargaining unit, for example, have the same benefits as those in the other departments. As well, a uniform job evaluation and classification scheme spans all departments.

23. Far from being an isolated department functioning independently from the others, the Printing and Advertising Department is an integrated part of the respondent's operation. Its link with other departments may be seen in the physical spread of the Department in the building, the duties of some persons in the proposed bargaining unit expanding beyond the Printing and Advertising Department and involving regular contact with persons from other departments, the transferability of the skills involved in some of the positions, as well as the uniform terms and conditions of employment and the single job evaluation and classification scheme applied to all departments.

24. Having regard to the evidence outlined above the Board concludes that the proposed bargaining unit does not constitute a functional independent entity comprised of persons who share a community of interest separate and distinct from the other office, clerical and technical employees of the respondent. Accordingly, the Board finds that the proposed unit is not appropriate. Having regard to the alternate agreement of the parties noted in paragraph 8 above, the Board is satisfied that the appropriate unit is that proposed by the respondent.

25. The Board is further satisfied that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 7th, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. The application is therefore dismissed.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1979

### BARGAINING AGENTS CERTIFIED DURING OCTOBER

#### No Vote Conducted

**1829-78-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Gesco Warehousing & Distributing Co. operated by Gesco Distributing Limited (Respondent).

Unit: "all employees of the Respondent at its warehouse operation, Weston, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff, persons employed on a regular basis for twenty-four hours a week or less and students employed during the school vacation period." (30 employees in the unit).

**2168-78-R:** Ontario Nurse's Association (Applicant) v. Campbellford Memorial Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity at Campbellford Memorial Hospital, Campbellford save and except nursing supervisors, persons above the rank of nursing supervisor and persons regularly employed for not more than 24 hours per week." (22 employees in the unit).

**0585-79-R:** United Cement, Lime and Gypsum Workers International Union (Applicant) v. Hamilton Automatic Vending Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working in and out of the respondent's plant at 377 Gage Avenue, North, in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students hired for the school vacation period." (49 employees in the unit). (*Having regard to the agreement of the parties*).

**0697-79-5:** Printing Specialties & Paper Products Union Local 688 (Applicant) v. Pakfold Business Forms (Respondent).

Unit: "all clerical employees of the respondent at Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, salesmen, secretary to the Vice-President, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and employees covered by a subsisting collective agreement." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**0708-79-R:** Alliance Employees' Union (Applicant) v. Public Service Alliance of Canada (Respondent).

Unit: "all employees of the respondent employed as office support staff at 233 Gilmour Street, Ottawa, Ontario, save and except those employees employed in a confidential capacity, employees represented by the Ottawa Typographical Union, Local 102 and employees employed as office support



staff in the National Capital Region Office, 233 Gilmour Street, Ottawa, Ontario.” (66 employees in the unit). (*Having regard to the foregoing*).

**0720-79-5:** The Sarjeant Co. Employees’ Association (Applicant) v. The Sarjeant Company Limited (Respondent)

Unit #1: “all employees of the respondent working in and out of its plant located in the City of Barrie, save and except service men, despatchers and head mechanics, persons above the rank of despatcher and head mechanic, office and sales staff.” ( employees in the unit).

Unit #2: “all employees of the respondent working in and out of its plant located in the City of Orillia, save and except service men, despatchers and head mechanics, persons above the rank of despatcher and head mechanic, office and sales staff.” ( employees in the unit).

Unit #3: “all employees of the respondent working in and out of its plant located in the Town of Midland, save and except service men, despatchers and head mechanics, persons above the rank of despatcher and head mechanic, office and sales staff.” ( employees in the unit).

**0764-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Tillston-Sekisui Plastics Limited (Respondent) v. Employee (Objector).

Unit: “all employees of the respondent employed in the Town of Newmarket, Ontario, save and except foremen and persons above the rank of foreman, office, sales and clerical staff.” (35 employees in the unit). (*Having regard to the agreement of the parties*).

**0770-79-R:** Retail Clerks Union, Local 409 (Applicant) v. Domco Foodservices Ltd. (Respondent) v. Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Intervener).

- and -

**0777-79-R:** Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Domco Food Services Limited (Respondent) v. Retail Clerks Union, Local 409 (Intervener).

Unit: “all employees of the respondent engaged in the business of retail sale of prepared food and ancillary operations of such business in the City of Thunder Bay, Ontario, save and except employees presently covered by subsisting collective agreements, Assistant Manager and persons above the rank of Assistant Manager.” (36 employees in the unit).

**0865-79-R:** The Greater Northern Ontario Trucking Association (Applicant) v. Ethier Sand & Gravel Limited (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Sudbury who are employed as truck drivers or are owner/operators of trucks and dependent contractors of the respondent.” (20 employees in the unit). (*Having regard to the foregoing*).

**0930-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Tempo Concrete & Drains Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (29 employees in the unit).

**0953-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Trail Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Huron Park, Ontario, save and except Foremen and Chief Inspectors, persons above the rank of Foreman and Chief Inspector, office, clerical and technical staff, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (43 employees in the unit). (*Having regard to the agreement of the parties*).

**0976-79-R:** Canadian Food and Associated Services Union (Applicant) v. The Borden Company Limited – Retail Operations (Respondent).

Unit: “all employees of the respondent working at Scoops Restaurant at 136 Yorkville Avenue in Metropolitan Toronto, save and except managers and assistant managers and those persons above the rank of assistant manager, and musicians.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

**1040-79-R:** Labourers’ International Union of North America, Local 506 (Applicant) v. Newman Bros. Co. Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Having regard to the above*).

**1051-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Turzillo Contracting Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Township of Kendry and the surrounding Townships of Alexandra, Webster, Beniah, Haggart, Calhonn, Sydere, Bradburn, Calder except for those portions of the Townships of Bradburn, Calhonn and Calder which are encompassed within a 50 mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*clarity notes*)

**1052-79-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Banvil Limited (Respondent).

Unit: “all employees of the respondent at Milton, Ontario, save and except foremen, and persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period.” (21 employees in the unit).

**1071-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Industrial Lighting and Contracting Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Equeung and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

**1074-79-R:** Graphic Arts International Union, Local 12-L (Applicant) v. Bonar & Bemis Limited (Respondent).

Unit: "all artists in the employ of the Bonar & Bemis Limited, Graphic Arts Division, at Rexdale, Ontario, save and except persons regularly employed for not more than twenty-four hours per week." (2 employees in the unit).

**1086-79-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Herman Verschuuren (Respondent).

Unit: "all employees of the respondent working in the Regional Municipality of Durham, save and except foremen, persons above the rank of foreman, office and sales staff and dependent contractors." (4 employees in the unit). (*Having regard to the agreement of the parties*).

**1087-79-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Herman Verschuuren (Respondent).

Unit: "all dependent contractors working for the respondent in the Regional Municipality of Durham, save and except dispatchers, persons above the rank of dispatcher, office and sales staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1088-79-R:** Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Plakmeyer Haulage (Respondent).

Unit: "all employees of the respondent working in the Regional Municipality of Durham, save and except foremen and persons above the rank of foreman, office and sales staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1090-79-R:** Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union no. 124, Ottawa-Hull (Applicant) v. D.M.C. Construction Inc. (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*clarity note*).

**1091-79-R:** Local No. 3 of The Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen (Applicant) v. Dur Fran Masonry Ltd. (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemason's apprentices in the employ of the respondent in the County of Wellington save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

**1109-79-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Prescott (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Prescott, Ontario, save and except Foremen, persons above the rank of foreman, office, clerical and technical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in the unit).



**1112-79-R:** Service Employees Union, Local 210, Affiliated with Service Employees International Union (Applicant) v. The Corporation of the Town of Wiarton (Respondent).

Unit: "all outside employees of the Corporation of the Town of Wiarton save and except supervisors, foremen, persons above the rank of foreman, office staff and any employees covered by subsisting collective agreements." (13 employees in the unit). (*Having regard to the agreement of the parties*).

**1116-79-R:** Ontario Public Service Employees Union (Applicant) v. Owen Sound Emergency Services Inc. (Respondent).

Unit: "all employees of Owen Sound Emergency Services Inc. in Owen Sound, Ontario save and except owner-operators, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

**1120-79-R:** Local No. 3 of The Ontario Provincial Conference of Bricklayers of The International Union of Bricklayers and Allied Craftsmen (Applicant) v. Leo Jan Masonry Ltd. (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

**1122-79-R:** Ontario Public Service Employees Union (Applicant) v. C. M. Hincks Treatment Centre Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of C. M. Hincks Treatment Centre Inc. in Toronto save and except the Accounting Supervisor, persons above the rank of Accounting Supervisors and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity notes*).

**1141-79-R:** Toronto Typographical Union No. 91 (I.T.U.) (Applicant) v. Compositor Associates Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, employed in composing room work, save and except non-working foremen and persons above the rank of non-working foreman." (31 employees in the unit). (*Having regard to the agreement of the parties*).

**1142-79-R:** Toronto Typographical Union No. 91 (I.T.U.) (Applicant) v. Accutext Limited (Respondent).

Unit: "all employees of Accutext Limited in the Municipality of Metropolitan Toronto employed in composing room work, save and except foremen and persons above the rank of foreman." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**1143-79-R:** Bakery, Confectionary & Tobacco Workers International Union, Local 264 (Applicant) v. Kuemmerling Distilleries Ltd. and Dr. Hillers Peppermint Canada Ltd. (Respondents).

Unit: "all employees of the respondents in the Regional Municipality of Niagara, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff and employees covered by any outstanding certificates of the Board." (18 employees in the unit). (*Having regard to the agreement of the parties*).

**1151-79-R:** International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Lakeport Auto Painting Limited (Respondent).

Unit: "all employees of Lakeport Auto Painting Limited at Thunder Bay, Ontario save and except foremen, persons above the rank of foreman, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

**1152-79-R:** International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Mascarin Auto Body Limited (Respondent).

Unit #1: "all employees of the Respondent at Thunder Bay, Ontario engaged in auto body repair work, save and except foremen, persons above the rank of foreman, office and clerical employees and employees engaged in iron fabrication including ornamental ironwork." (2 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the Respondent at Thunder Bay, Ontario, while engaged at the premises of the Respondent in iron fabrication including ornamental iron work, save and except foremen, persons above the rank of foreman, office and clerical employees and employees engaged in auto body repair work." (2 employees in the unit). (*Having regard to the further agreement of the parties*). (*clarity notes*).

**1159-79-R:** Canadian Union of Public Employees (Applicant) v. Central Branch of The Young Men's Christian Association of Metropolitan Toronto (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Y.M.C.A. Branch save and except professional staff, Department Managers, Physical Instructors, Dietitians, Supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (44 employees in the unit). (*Having regard to the agreement of the parties*).

**1167-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. G. Doerrsam & Sons Co. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1168-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Elrose Construction Co. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1169-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Ridgewood Insulation Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

**1172-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2737 (Applicant) v. Tradewood Industries Ltd. (Respondent).

Unit: “all employees of the respondent in St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

**1189-79-R:** The Canadian Union of Public Employees (Applicant) v. Macdonnell Memorial Hospital (Respondent).

Unit: “all employees of the respondent regularly employed for not more than 24 hours per week at its hospital in Cornwall, Ontario, save and except office staff, medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman and chief engineer.” (46 employees in the unit). (*Having regard to the agreement of the parties*).

**1196-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 16 (Respondent).

Unit: “all employees of the respondent employed at 5 Parkway Forest Drive, Don Mills, Ontario, including resident superintendents, save and except property manager, office and clerical staff.” (4 employees in the unit).

**1205-79-R:** Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Bay Haven Nursing Home Inc. (Respondent) v. Group of Employees (Objectors).

Unit #1: “all employees of Bay Haven Nursing Home Inc. in Collingwood, Ontario, save and except professional nursing staff, physiotherapists, occupational therapist, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (16 employees in the unit).

Unit #2: “all employees of Bay Haven Nursing Home Inc. in Collingwood, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapist, supervisors, and persons above the rank of supervisor.” (21 employees in the unit).

**1206-79-R:** United Steelworkers of America (Applicant) v. Donald L. Hart Limited, carrying on business as Murphy Bros. (Respondent).

Unit: “all employees of the respondent in Burlington, Ontario save and except foremen, persons above the rank of foreman, office and sales staff.” (7 employees in the Unit).

**1210-79-R:** Laborers’ International Union of North America Local Union No. 597 (Applicant) v. Pentagon Construction Canada Inc. (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

**1211-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. American Construction Co. (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).



**1215-79-R:** Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C. (Applicant) v. Modern Building Cleaning, Division of Dustbane Enterprises Limited (Respondent).

Unit #1: "all employees of the respondent engaged in cleaning services at the Peterborough Square, Peterborough, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (4 employees in the unit). (*Having regard to the agreement of the parties*).

Unit 2: "all employees of the respondent engaged in cleaning services at Peterborough Square, Peterborough, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff." (3 employees in the unit). (*Having regard to the further agreement of the parties*).

**1216-79-R:** United Steelworkers of America (Applicant) v. Dominion Steel Export Co. Ltd. (Dome) (Respondent).

Unit: "all employees of the respondent company in Bramalea, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation." (24 employees in the unit).

**1220-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 1881 Leslie Street in the City of North York in the Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (51 employees in the unit). (*Having regard to the agreement of the parties*).

**1225-79-R:** Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Lincoln (Respondent).

Unit: "all employees of the Public Works Department and the Recreation Department of the respondent in the Regional Municipality of Niagara save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in the unit).

**1235-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Adam Nedokis (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foreman and persons above the rank of non-working foremen." (2 employees in the unit). (*Having regard to the foregoing*).

**1238-79-R:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Control Services (Respondent).

Unit: "all employees of the respondent working at Talbotville, save and except foreman, persons above the rank of foreman, sales and office staff." (2 employees in the unit).

**1240-79-R:** Association of Commercial and Technical Employees, Local 1704, C.L.C. Community Legal Services Section (Applicant) v. Riverdale Socio-Legal Services (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except staff lawyers and those above the rank of staff lawyer.” (4 employees in the unit).

**1254-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Spadco Construction Company Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

**1256-79-R:** United Steelworkers of America (Applicant) v. Ron’s Mould and Die Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent company in Waterloo, Ontario, save and except persons above the rank of foreman, office and sales staff.” (10 employees in the unit).

**1272-79-R:** Canadian Union of Public Employees (Applicant) v. Corporation of the County of Lark Fairview Manor (Respondent) v. Group of Employees (Objectors)

Unit #1: “all employees of the respondent in Almonte, save and except graduate and undergraduate nurses, office and clerical staff and persons regularly employed for not more than twenty-four hours per week.” (47 employees in the unit).

Unit #2: “all persons regularly employed for not more than twenty-four hours per week, save and except graduate and undergraduate nurses, office and clerical staff.” (16 employees in the unit).

**1279-79-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233 (Applicant) v. Dantam Investments Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent within Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (35 employees in the unit).

**1280-79-R:** International Union of Bricklayers & Allied Craftsmen Local No. 7 (Applicant) v. Brune Construction & Management Ltd. (Respondent).

Unit: “bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

**1285-79-R:** Laborers’ International Union of North America Local 247 (Applicant) v. Newman Bros. Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of

Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit). (*Having regard to the foregoing*).

**1290-79-R:** Hotel & Restaurant Employees & Bartenders International Union Restaurant, Cafeteria and Tavern Employees Union Local 254 (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B. Q. (Respondent) v. Canadian Union of Restaurant & Related Employees (Intervener).

Unit: “all employees of the respondent employed at 2990 Eglinton Avenue East in the Borough of Scarborough in the Municipality of Metropolitan Toronto in the Province of Ontario, save and except hostesses and persons above the rank of hostess.” (81 employees in the unit). (*Having regard to the agreement of the parties*).

**1293-79-R:** The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

**1294-79-R:** United Cement, Lime and Gypsum Workers International Union (Applicant) v. Lesmith Limited (Respondent).

Unit: “all employees of Lesmill Limited at Oakville, Ontario save and except supervisors, those above the rank of supervisor, office and sales staff.” (17 employees in the unit). (*Having regard to the agreement of the parties*).

**1298-79-R:** Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. Porcupine Inn (Respondent).

**1299-79-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Porcupine Inn (Respondent).

Unit: “all employees of the Porcupine Inn at Timmins, Ontario save and except department heads and persons above the rank of department head, Comptroller and secretary to General Manager.” (49 employees in the unit). (*Having regard to the agreement of the parties*).

**1303-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 4452 Sheppard Ave. East, in the Borough of Scarborough, in the Municipality of Metropolitan Toronto and Province of Ontario save and except hostesses and persons above the rank of of hostess.” (60 employees in the unit). (*Having regard to the agreement of the parties*).

**1306-79-R:** Ontario Nurses’ Association (Applicant) v. Campbellford Memorial Hospital (Respondent).



Unit: “all registered and graduate nurses employed in a nursing capacity at Campbellford Memorial Hospital, Campbellford, for not more than 24 hours per week, save and except nursing supervisors and persons above the rank of nursing supervisor.” (26 employees in the unit).

**1307-79-R:** Graphic Arts International Union, London, Local 517 (Applicant) v. Pro Promotions, Plastics and Printing Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees employed by the respondent at 1005 Hargrieve Road, London, Ontario, save and except non-working foremen persons above the rank of non-working foreman, office and sales staff.” (20 employees in the unit). (*Having regard to the agreement of the parties*).

**1310-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 540 Montreal Road in Ottawa, save and except hostesses and persons above the rank of hostess.” (58 employees in the unit). (*Having regard to the agreement of the parties*).

**1318-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. Retail Environments Ltd. Store Designers and Fixtures (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

## Applications Certified Subsequent to Pre-Hearing Vote

**0127-79-R:** Graduate Assistants Association (Applicant) v. McMaster University (Respondent).

Unit: “all employees of the respondent in Hamilton employed as teaching assistants, demonstrators, tutors or markers save and except those persons covered by subsisting collective agreements.” (1059 employees in the unit). (*clarity note*).

Number of names of persons on revised voters’ list	1056
Number of persons who cast ballots	434
Ballots segregated and not counted	10
Number of ballots marked in favour of applicant	221
Number of ballots marked against applicant	203

**1041-79-R:** International Union of Operating Engineers, Local 796 (Applicant) v. Goodyear Canada Inc. (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener).

Unit: “all stationary engineers and persons primarily engaged as their helpers in the employ of Goodyear Canada Inc. in its Power House at its plant in Collingwood, save and except chief engineer and persons above the rank of chief engineer.” (4 employees in the unit).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of the applicant	3	
Number of ballots marked against the applicant	0	

**1161-79-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Wimco Steel Sales Co. Limited (Respondent) v. Canadian Transportation Workers' Union No. 197, N.C.C.L. (Intervener).

Unit: "all truck drivers employed by the respondent and working in or out of its 1218 South Service Road West plant in Oakville, Ontario, save and except foremen, persons above the rank of foremen and persons regularly employed for not more than twenty-four (24) hours per week," (16 employees in the unit).

Number of names of persons on revised voters' list		17
Number of persons who cast ballots	14	
Number of ballots marked in favour of the applicant	13	
Number of ballots marked in favour of intervener	1	

### Applications Certified Subsequent to Post-Hearing Vote

**0676-79-R:** Service Employees Union Local 268 (Applicant) v. St. Joseph's General Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of St. Joseph's General Hospital in the City of Thunder Bay regularly employed for not more than 25 hours per week in the classifications listed on Schedule "A" of the full-time collective agreement between St. Joseph's General Hospital and Service Employees Union Local 268 and students employed during the school vacation period, save and except professional medical staff, graduate pharmacists, undergraduate pharmacists, pharmacist assistants, graduate dietitians, student dietitians, technical personnel, social service workers, speech therapists, enterostomal therapists, recreational therapists, play therapists, audiologists, psychometrists, psychology assistants, counsellors, counsellor assistants, prosthetists, orthotists, pastoral care assistants, office and clerical staff, persons on a cooperative work-study programme, watchmen, members of Sisters of St. Joseph of Sault Ste. Marie, supervisors, foremen and foreladies, persons above the rank of foreman and forelady and persons covered by subsisting collective agreements." (67 employees in the unit).

Number of names of persons on list as originally prepared by employer		67
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	1	

**0790-79-R:** The Plainfield Children's Home Employees' Association (Applicant) v. Plainfield Children's (Respondent) v. Retail Clerks International Union (Intervener).

Unit: "all employees of the respondent working in the Thurlow Township, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, the chief maintenance man, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (56 employees in the unit).

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant	41	
Number of ballots marked in favour of intervener	8	

**0795-79-R:** Toronto Printing Pressmen & Assistants' Union Local 10 Subordinate to:- International Printing & Graphic Communications Union (Applicant) v. Brown & Collett Limited (Respondent).

Unit: "all pressmen, assistant pressmen, cameramen, compositors, preparatory workers and their apprentices, save and except non-working foremen and those above the rank of non-working foremen, employed in the plant of the respondent located in Metropolitan Toronto." (16 employees in the unit).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	3	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**0917-79-R:** Service Employees International Union, Local 204 (Applicant) v. Toronto East General and Orthopaedic Hospital Inc. (Respondent). (75 employees).

**1170-79-R:** The Canadian Union of Public Employees (Applicant) v. The Catholic Children's Aid Society of Hamilton-Wentworth (Respondent).

Unit: "all employees of the Foster Group Home Program of the Catholic Children's Aid Society of Hamilton-Wentworth, save and except supervisors and persons above the rank of supervisor." (9 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity notes*).

**1227-79-R:** Lawment Trade Union (Applicant) v. Barry J. Lawrence Management Ltd. (Respondent) v. United Cement Lime & Gypsum Workers International Union AFL-CIO, CLC (Intervener). (23 employees).

### Certification Dismissed Subsequent to Post-Hearing Vote

**0946-79-R:** Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of American (Applicant) v. Canada Dry Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all advance salesmen, driver merchandisers, driver merchandiser helpers, telephone sales clerks, food service employees employed by the respondent in the Municipality of Toronto save and except salesmen, dispatchers, office staff, employees in the Extract Department and Quality Control Department, all inside employees." (217 employees in the unit).



Number of names of persons on revised voters' list		89
Number of persons who cast ballots		86
Number of ballots marked in favour of the applicant	14	
Number of ballots marked against the applicant	72	

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0463-79-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Lorondi Design and Construction (Respondent). (4 employees).

**0601-79-R:** International Union of Bricklayers and Allied Craftsmen Local Union #28 (Applicant) v. Martial Masonry Contractors (Respondent). (9 employees).

**0635-79-R:** The United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Ron Engineering and Construction (Eastern) Ltd. Gilcar Supervision and Management Limited and G. Lavictoire and Brothers (Respondents). (3 employees).

**0951-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ball Brothers Limited (Respondent). (3 employees).

**0971-79-R:** Resilient Floor Workers Local Union 1465, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Reliable Lumber Products Ltd. (Respondent). (4 employees).

**1035-79-R:** Service Employees Union, Local 204 Affiliated with A.F. of L., C.L.O., and C.L.C. (Applicant) v. Bestview Holdings Limited (Oshawa Bestview Lodge) (Respondent). (8 employees).

**1068-79-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Comstock International Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. International Brotherhood of Electrical Workers, Local Union 120 (Intervener #2). (7 employees).

**1094-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. S and S Metals (Respondent) v. United Steelworkers of America (Intervener). (2 employees).

**1134-79-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Women's Christian Association of London (Respondent). (33 employees).

**1135-79-R:** Oil, Chemical & Atomic Workers International Union (Applicant) v. Progress Plastics and Compounds Inc. (Respondent). (6 employees).

**1147-9-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lavern Asmusen Limited (Respondent). (4 employees).

**1173-79-R:** The United Brotherhood of Carpenters & Joiners of America Local 2466 (Applicant) v. McKay - Cocker Construction Ltd. (Respondent). (2 employees).

**1186-79-R:** Labourers' International Union of North America, Local 527 (Applicant) v. Concorde Maintenance Limited (Respondent). (72 employees).

**1195-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. San-Jac Concrete & Drains Ltd. (Respondent). (12 employees).

**1197-79-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Society for Goodwill Services (Respondent). (77 employees).

**1213-79-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Central Park Lodge (Kitchener) (Respondent). (3 employees).

**1214-79-R:** London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Central Park Lodge (Kitchener) (Respondent). (3 employees).

**1250-79-R:** Canadian Chemical Workers Union (Applicant) v. National General Filter Products Ltd. (Respondent). (25 employees).

**1257-79-R:** Service Employees International Union, Local 183 A.F. of C.I.O., C.L.C. (Applicant) v. Lennox and Addington County General Hospital (Respondent). (21 employees).

**1273-79-R:** United Steelworkers of America (Applicant) v. Storall Industries Limited (Respondent). (9 employees).

**1274-79-R:** Ontario Taxi Association 1688 Canadian Labour Congress (Applicant) v. Windsor Air-line Limousine Service Ltd. Veteran Cab Co. (Subsidiary) (Respondent). (250 employees).

**1286-79-R:** International Union of Operating Engineers Local 793 (Applicant) v. T.I.W. Industries, Ltd. Steel Plateworks Division (Respondent). (2 employees).

**1340-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Jambor and Osborne Limited (Respondent). (2 employees).

**1342-79-R:** Canadian Union of Operating Engineers General Workers (Applicant) v. British Leaf Tobacco Company of Canada Limited (Respondent). (5 employees).

**1353-79-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Flanagan Delivery Service Limited (Respondent). (7 employees).

## **APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS**

**0888-79-R:** Vern Waite (Applicant) v. Teamsters Local No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Andron Agencies Ltd. (Intervener). (*Granted*).

Unit: 'all permanent employees of Andron Agencies Ltd., save and except foremen, persons above the rank of foreman, watchmen and office staff.' (4 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		4
Number of ballots marked in favour of the respondent	1	
Number of ballots marked against the respondent	3	

**0967-79-R:** Gerry Morrison (Applicant) v. United Steelworkers of America on behalf of Local 8683 (Respondent) v. Crown Cork & Seal Company Limited (Intervener). (*Granted*).

Unit: 'all office and clerical employees of the Company at Concord, Ontario, save and except supervisor, persons above the rank of supervisor, secretary to the President, secretary to the Industrial Relations Manager, secretary to the Chief Financial Officer, secretary to the Controller, Benefits Clerk, Assistant Accounting Supervisor, Professional Engineer, Sales and Field Staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.' (32 employees in the unit).

Number of names of persons on revised voter's list		28
Number of persons who cast ballots		27
Number of ballots marked in favour of the respondent	10	
Number of ballots marked against the respondent	17	

**0981-79-R:** Employees of Nel-Gor Castle Nursing Home (Applicant) v. Canadian Union of Public Employees (Respondent). (30 employees). (*Dismissed*).

**0988-79-R:** Medi-Park Lodges Inc. carrying on business as Grace Abbey Nursing Home (Applicant) v. Service Employees Union, Local 204 (Respondent). (16 employees). (*Dismissed*).

**1157-79-R:** Dina Di Vito (Applicant) v. Retail, Wholesale and Department Store Union, AFL: CIO: CLC: (Respondent). (employees). (*Granted*).

**1163-79-R:** Russell Boldrick (Applicant) v. International Union of Operating Engineers (Respondent). (4 employees). (*Granted*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**0950-79-U:** Ellis-Don W.A. Inc. (Applicant) v. International Association of Bridge Structural and Ornamental Iron Workers Local 700 and P. Doyle (Respondent). (*Withdrawn*).

**1325-79-U:** The Corporation of the Town of Ajax (Applicant) v. The Canadian Union of Operating Engineers (Respondent). (*Withdrawn*).

**1367-79-R:** B. and P. Installation and Services Ltd. (Applicant) v. Evertt Daniels, Bill Maloney, Earl McCormick, Howard Stratham, Ray Thompson, Stan Whitty and Local 595, United Brotherhood of Carpenters and Joiners of America, Millwright District Council of Ontario (Respondent). (*Withdrawn*).



## APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

**0642-79-U:** Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. J. H. Normick Inc. (Kirkland Lake Division (Respondent)). (*Dismissed*).

**1078-79-U:** United Steelworkers of America (Applicant) v. Shaw Alnex Industries Ltd. (Respondent). (*Withdrawn*).

**1118-79-U:** Retail Clerks International Union, Local 233F, Footwear Division affiliated with Canadian Labour Congress and the AFL-CIO (Applicant) v. Hewetson Shoe Company (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**1775-78-U:** International Brotherhood of Electrical Workers, Local 1565 (Applicant) v. Great Lakes Forest Products (Respondent). (*Withdrawn*).

**1253-79-U:** Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 16 and Westwood Property Management Limited (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**1754-78-U:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Domtar Inc. (Respondent). (*Withdrawn*).

**1776-78-U:** International Brotherhood of Electrical Workers, Local 1565 (Complainant) v. Great Lakes Forest Products (Respondent). (*Withdrawn*).

**0154-79-U:** The Staff Association Haldimand-Norfolk Regional Health Unit (Complainant) v. Haldimand-Norfolk Regional Health Unit (Respondent). (*Dismissed*).

**0234-79-U:** United Brotherhood of Carpenters and Joiners of America, Local 3054 (Complainant) v. Selinger Wood Ltd., Peter Selinger and Walter Milley (Respondent). (*Granted*).

**0237-79-U:** Fashion Craft Kitchens Inc. (Complainant) v. The United Brotherhood of Carpenters and Joiners of America, Local Union 3054 (Respondent). (*Dismissed*).

**0247-79-U:** Rose Zannino & Rita Sannuto (Complainants) v. Ganz Bros. Toys Ltd. and International Union of Doll and Toy Workers of the U.S.A. and Canada, Local 905 (Respondent). (*Withdrawn*).

**0317-79-U:** Retail Clerks Union, Local 206 (Complainant) v. Makita Power Tools, Canada, Ltd. (Respondent). (*Dismissed*).

**0332-79-U:** Dominion Maintenance Limited, Harkness Waters Ltd., K.L. McCormick Painting Co. (Division of Redmond Smithers Ltd.,) and Gallant Enterprises (Complainants) v. The Ontario Painting Contractors Association, The Accoustical Association Ontario, The Interior Systems Contractors Association, Kelvin Edgar, et. al. (Respondent). (*Dismissed*).

**0376-79-U:** Canadian Union of Public Employees and Local 2103 (Complainant) v. Groves Park Lodge (Respondent). (*Withdrawn*).

**0541-79-U:** Gary Robert Walsh (Complainant) v. Canadian Union of Public Employees, Toronto Civic Employees Union, Local 43 (Respondent).

- and -

**0575-79-U:** Gary Robert Walsh (Complainant) v. Canadian Union of Public Employees, Toronto Civic Employees Union, Local 43 (Respondent). (*Withdrawn*).

**0990-79-U:** Gary Robert Walsh (Complainant) v. Canadian Union of Public Employees, Mr. Al Sims, Toronto Civic Employees Union, Local 43 (Respondent). (*Withdrawn*).

**0563-79-U:** Ontario Public Service Employees Union (Complainant) v. The Art Gallery of Ontario (Respondent).

- and -

**0600-79-U:** Ontario Public Service Employees Union (Complainant) v. The Art Gallery of Ontario (Respondent). (*Granted*).

**0757-79-U:** Mario Sperduti (Complainant) v. Zehrs Markets Limited (Respondent). (*Dismissed*).

**0760-79-U:** Christopher M. Sojka (Complainant) v. Massey-Ferguson Industries Limited and U.A.W. Local 439 (Respondent). (*Dismissed*).

**0817-79-U:** United Garment Workers (Complainant) v. Hudson Sportswear (Respondent). (*Dismissed*).

**0831-79-U:** Labourers' International Union of North America, Local 183 (Complainant) v. Tillotson-Sekisui Plastics Limited (Respondent). (*Granted*).

**0851-79-U:** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Western Dispatch Inc. Operating as Western Dispatch Company (Respondent). (*Withdrawn*).

**0876-79-U:** Graphic Arts International Union, Local 542 (Complainant) v. Reid Dominion Packaging Ltd. (Respondent). (*Withdrawn*).

**0879-79-U:** Michael Robert Reeder (Complainant) v. De Havilland Aircraft of Canada Limited and Local 112, United Automobile, Aerospace and Agricultural Implement Workers of America (Respondents). (*Dismissed*).

**0927-79-U:** Canadian Food and Associated Services Union (Complainant) v. Borden Ice Cream Parlours (Respondent). (*Withdrawn*).

**0979-79-U:** Canadian Food and Associated Services Union (Complainant) v. The Borden Company Limited – Retail Operations (Respondent). (*Withdrawn*).

**0980-79-U:** Canadian Food and Associated Services Union (Complainant) v. Scoops Restaurant – Borden Ice Cream Parlours (Respondent). (*Withdrawn*).

**1010-79-U:** Canadian Union of Industrial Employees (Complainant) v. Bermay Corporation (Respondent). (*Withdrawn*).

**1031-79-U:** United Garment Workers of America (Complainant) v. Deacon Brothers Limited (Respondent). (*Dismissed*).

**1042-79-U:** Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Complainant) v. Red-D-Mix Concrete Company Division of Standard Industries Ltd. (Respondent). (*Withdrawn*).

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Labour  
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**A Monthly Series of Decisions from the  
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**Cited [1979] OLRB REP.**

Selected decisions of particular reference value are  
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C.D.C. HOLDINGS LIMITED; RE TEAMSTERS’ UNION LOCAL 938; ENGINEERING CONSTRUCTORS ASSOCIATION .....

**1503-79-R** International Union of Operating Engineers, Local 793,  
Applicant, v. **Alnor-Earthmoving Limited**, Respondent.

**Certification – Construction Industry – Geographic description of Board Area No. 10  
amended to reflect change in municipal and regional boundaries**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

**DECISION OF THE BOARD;** December 10, 1979

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4. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

5. The only job site affected by this application is in the Port Hope area. The applicant has asked that the bargaining unit be described in terms of the Board's standard geographic area No. 10, namely, the Township of Hope in the County of Durham and the Townships of South Monaghan, Hamilton, Haldimand and Alnwick in the County of Northumberland. This description is outdated and in need of change. The effect of The Regional Municipality of Durham Act, 1973 was to dissolve the County of Durham, and to annex both the municipal Township of Hope and the Towns of Port Hope (i.e. the geographic Township of Hope) to the County of Northumberland. The Township of South Monaghan was at the same time annexed to the County of Peterborough. According to the 1979 Municipal Directory published by the Ministry of Intergovernmental Affairs, the total population of this Township in 1978 was 941. All of the County of Peterborough has traditionally been included in Board area No. 11, and it seems reasonable to maintain this situation notwithstanding the addition to the County of the Township of South Monaghan. Accordingly, we are satisfied that the description of Board area No. 10 should be altered so as to read as follows, namely, the geographic Townships of Hope, Hamilton, Haldimand and Alnwick in the County of Northumberland. For the purposes of clarity, we would note that a reference to a geographic township is meant to include all municipal entities within the geographic township.

6. This alteration to the description of Board area No. 10 is meant only to reflect the changes to the relevant county boundaries. The Board's practice is not to make any major alterations to Board areas without all interested trade unions and employer organizations being given an opportunity to make submissions on the matter.

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9. A certificate will issue to the applicant.

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**1237-79-R** Labourers' International Union of North America, Local 183, Applicant, v. **Belvedere Drain and Concrete Limited**, Respondent.

**Bargaining Unit – Certification – Construction Industry – Labourer's bargaining unit description reviewed – Seeking unit pursuant to section 6(1) – Whether certain craft employed on application date**

**BEFORE:** Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *B. Fishbein and L. Castaldo for the applicant; S. C. Bernardo and Mario Belvedere for the respondent.*

**DECISION OF THE BOARD;** December 11, 1979

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2. This is an application for certification filed pursuant to the construction industry provisions of *The Labour Relations Act*.

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4. On the date of the making of the application the respondent was engaged in performing certain concrete finishing and drain-laying work on residential building projects in Board Area #8. There is no question but that a number of construction labourers were engaged in performing this work. The applicant has on a number of occasions been certified to represent construction labourers engaged in similar types of work. In such cases the bargaining unit has generally been described in terms of all construction labourers employed on residential construction in Board Area #8, save and except helpers of bricklayers and plasterers. It should be noted that such a bargaining unit description is unique to Board Area #8, since outside of this area the Board describes units of construction labourers without reference to the work they are engaged in. The reference to the type of work in Board Area #8 arises from the fact that the applicant and its sister local 506 are both active in the area, and that the Labourers' International Union of North America has for its own internal purposes allotted each of the locals jurisdiction over certain work. When either of these locals comes before the Board to be certified, the Board generally describes the bargaining unit so as to follow this split in jurisdiction between the two locals. See *Peniche Construction Forming*, [1974] OLRB Rep. April 208.

5. In the instant case the applicant is not seeking its standard bargaining unit. Instead, it takes the position that it is applying to be certified for a unit of all trades employed by the respondent in Board #8, on the application date, namely, construction labourers and cement masons. It submits that the bargaining unit should be described in terms of all construction labourers, cement masons and cement masons' apprentices in the employ of the respondent #8.

6. The respondent contends that it employed no cement masons in Board Area #8 on the application date and that the persons referred to as cement masons by the applicant are in fact construction labourers. On the basis of this contention the respondent takes the

position that the bargaining unit should be described solely in terms of construction labourers. The respondent further contends that the unit should be described in the normal way so as to restrict it only to construction labourers employed on residential construction save and except helpers of bricklayers and plasterers.

7. The Board's general practice is to describe construction industry bargaining units either along craft lines or by reference solely to construction labourers. However, when requested by an applicant union to do so, the Board will generally exercise its authority under section 6(1) of the Act and describe the bargaining unit in terms of all trades employed on the date of the making of the application. See *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 734. We see no reason why the same procedure should not be followed in the instant case. Since the issue as to whether or not the respondent did employ any cement masons in Board Area #8 on the application date is in dispute, the Board appoints Mr. N. Harper, Labour Relations Officer, to inquire into and report back to the Board on the classifications of those employees who were employed by the respondent in Board Area #8 on the date of the making of the application.

8. Whether the bargaining unit should be described in terms of both cement masons and construction labourers or construction labourers only, we are satisfied that the reference to construction labourers should be limited to those employed in residential construction, save and except those employed as helpers of bricklayers and plasterers. In coming to this conclusion, we have taken into account not only the above noted split in jurisdiction between the applicant and its sister local 506, but also the fact that on the application date the respondent did not employ any construction labourers engaged in the type of work which would normally be performed by construction labourers represented by local 506.

9. Whether the bargaining unit is ultimately described in terms of construction labourers only, or construction labourers and cement masons, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 5, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. Accordingly, the Board, pursuant to its discretion under section 6(1a) of the Act, hereby certifies the applicant as the bargaining agent for all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.

11. A formal certificate must await a final determination as to whether or not the bargaining unit should be described so as to also encompass cement masons and cement masons' apprentices.

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**0477-79-R** Retail, Wholesale and Department Store Union,  
AFL:CIO:CLC, Applicant, v. **Bennett Foods Limited**, Respondent.

**Appropriateness – Bargaining Unit – Wholesale and retail food business – Description of appropriate unit determined – Usarco criteria applied**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *H. Buchanan and Gordon D. Reekie for the applicant; K. W. Kort, H. J. Bennett, K. Cadieux and A. Miller for the respondent.*

**DECISION OF THE BOARD;** December 18, 1979

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3. This is an application for certification in which the applicant proposes a bargaining unit comprising all employees of the respondent at Kingston, in its warehouse and cash and carry operations save and except department head, persons above the rank of department head, advance salesmen and retail store employees.

4. The respondent, on the other hand, submits that the bargaining unit should include retail store employees and proposes the following as the proper unit:

“All employees of the respondent at Kingston, save and except Department Heads and persons above the rank of Department Head.”

5. The Board appointed an Examiner to inquire into the composition of the bargaining unit and heard the arguments of the parties as to the conclusions it should reach based on the evidence contained in the Examiner’s report.

6. The respondent carries on its business in two premises in the City of Kingston. These premises are situated across the street from one another. In one the respondent carries on a retail store while in the other it runs a wholesale and cash-and-carry operation. The wholesale, as such, usually involves an account and delivery by the company whereas the cash and carry, as the term implies, means the customer pays for and takes the goods.

7. It is the contention of the respondent that the operations carried on in both premises are so integrated in a number of ways that the appropriate bargaining unit should encompass all of its employees in its business in Kingston, except those claimed as excluded in its proposed description.

8. The applicant argued that the business of the respondent comprises two distinct operations and that they should be treated as such for the purposes of this application. The applicant also argued that in the case of other enterprises where it was the bargaining agent, retail store employees were separated from wholesale operations or warehouse operations and that the facts in this case, notwithstanding the presence of temporary transfers, supported its contention for certification for the employees in the unit it sought to the exclusion of those employees of the respondent working as retail store employees.



9. The respondent, in support of its argument for the overall bargaining unit, relied upon the criteria set out in the *Usarco* case, [1967] OLRB Rep. Sept. 526. That case involved an application for certification of employees in one of two plants operated by Usarco. The plants, unlike the premises in the present case, it should be noted, were not contiguous but, rather, were separated by some distance. The evidence is that in the instant case the warehousing of goods is carried on in both establishments with an interchange of goods and employees.

10. In considering the appropriate bargaining unit, the Board, in the *Usarco* case, stated the following as factors to be taken into consideration:

- (a) Community of Interest;
- (b) Centralization of Managerial Authority;
- (c) The Economic Factor of one bargaining unit; and
- (d) The Source of Work.

The Board set out criteria for determining the Community of Interest factor as follows:

- (a) Nature of Work Performed;
- (b) Conditions of Employment;
- (c) Skills of Employees;
- (d) Administration;
- (e) Geographical Circumstances; and
- (f) Functional Coherence and Interdependence.

11. Under the heading of Community of Interest the Board finds on the evidence that the *nature of the work performed* by employees in both premises is similar. Both areas are concerned with the storage and sale of food products. Employees are not formally classified but there are, for instance, persons referred to as stock boys employed in the retail store and also in the wholesale outlet. The evidence indicates that the functions performed in either operation are similar, and also that these personnel are interchangeable. Their work also involves moving goods from one place to the other as a regular function. Truck drivers are employed similarly to serve either one or the other of the operations according to need. The truck drivers also work inside when no deliveries are required.

12. The *conditions of employment* and the fringe benefits applicable to the employees are the same throughout both branches of the Bennett operations. The same starting rate for wages and the same policy governing wage increases are in force at both locations. Hours of work and overtime pay are uniform as are vacation benefits and the medical plan.

13. An examination of the evidence makes it clear that the *skills exercised by the employees* are not of a high order and are basically the same on both the retail side and the

wholesale side in comparative jobs. The evidence is that none of the employees at either location exercise skills which prevents an employee from the retail or wholesale end taking a job in the other outlet. There are meat cutters and truck drivers who require skills that are individually acquired so that interchange would obviously only apply as between persons having those skills.

14. The administration of the enterprise is handled from one office. There is one master payroll covering the employees in both aspects of the business. There is also an overall inventory with only one set of books maintained for that purpose. The method of recording some retail stock varies from that used in recording bulk stock but the inventory is that of the whole operation. A single financial statement is issued to cover the whole enterprise as a single operation. The hiring of employees is done centrally, whether their assignment is to the retail or to the wholesale branch. All employee records are kept in the administration office which administers the whole project.

15. As already noted, the *geographical circumstances* are that the retail and wholesale operations are carried on directly across the street from each other.

16. We have already attended to matters which fall under the *functional coherence and interdependence* factor. There is movement of inventory goods back and forth between the two premises on a regular basis. These goods are moved by employees of both branches. In addition to that, the employees are freely temporarily interchanged as the demands of the business dictate from time to time during the day. There have also been permanent transfers.

17. The *Managerial Authority* for the whole operation is centred in Bennett with the assistance of Cadieux and Miller who are department heads and who, although the evidence is not clear, appear to work on a consultative basis with respect to each department.

18. A consideration of the *Economic Factor*, insofar as it relates to the appropriateness of the unit, leads the Board to conclude that it tends to support the contention of the respondent.

19. The *Source of Work* is obviously common to both phases of the respondent's operation.

20. On the basis of all of the evidence viewed in light of the *Usarco* decision, *supra*, the Board finds that the business of the respondent at Belleville is a whole integrated operation in which the employees in both premises form one appropriate bargaining unit.

21. The Board therefore finds that all employees of the respondent at Kingston, save and except Department Heads and persons above the rank of Department Head, constitute a unit of employees of the respondent appropriate for collective bargaining.

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23. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on June 19, 1979, the terminal date fixed

for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. The application is therefore dismissed.

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**1444-79-R United Steelworkers of America, Applicant, v. Bond Structural Steel (1965) Ltd., Respondent.**

**Certification – Charges – Membership Evidence – Whether collector perceived as “boss” – Advising employees “join now for \$2,00 or pay \$150.00 later” – Whether causing Board to doubt membership evidence tendered**

**BEFORE:** Rory F. Egan, Vice-Chairman, and Board Members C. G. Bourne and A. Hershkovitz.

**APPEARANCES:** *Gerry Reeds and Mary Shane for the applicant; Donald J. McKillop, Q.C. and Len Prusky for the respondent.*

**DECISION OF THE BOARD;** December 7, 1979

1. This is an application for certification in which the respondent requests the Board to dismiss the application on the grounds that the membership evidence filed in support of the application was sought and obtained contrary to sections 61 and 62 of *The Labour Relations Act*. Those sections provide as follows:

“61. No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

62. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.”

2. The respondent alleges that A. Daniel, an employee, sought by intimidation and coercion to obtain and compel employees to sign membership cards in the applicant trade union. It is alleged by the respondent that Daniels is considered by employees as “boss” and that they felt they had to sign the cards to keep their jobs.

3. The evidence is clear that Daniels obtained the overwhelming majority of the membership cards filed by the applicant in support of its application. There is no question that



Daniels is not an officer of the applicant union and was what has been referred to as a “rank and file” organizer.

4. It was also clear that while Daniels was charged with the duty of testing welders and advising management on the capabilities of persons as welders he performed no managerial functions or duties such as would exclude him from the bargaining unit.

5. It was the contention of the respondent, however, that his testing function, since he could report on an applicant’s qualifications, would make him appear to be a boss. There was evidence from the assistant foreman that a “while back” Daniels and a fellow worker, another welder, had recommended that a fellow be fired and he was terminated. There was, however, no expansion on this incident. It was clearly an isolated and unique incident involving a complaint from a fellow welder, as well as Daniels.

6. In his evidence, an employee by the name of Prata who had been subpoenaed by the company, said that counsel for the respondent had interviewed him and had asked him if Daniels was a boss. The witness told the Board that he had replied that Daniels “just works in the shop like anyone else”. In the result the Board finds that the evidence does not establish that Daniels would be viewed by any reasonable employee as a person in authority or a boss.

7. The further allegation is that during the course of obtaining members for the union Daniels told certain of the employees that they could join now and pay \$1.00 or pay \$150.00 to join the union later on. Prata said that having heard the option, he thought it better to sign at that time and did so. He added later that he was scared, “maybe go out of the company”. There was no evidence, however, that Daniels had made any reference whatsoever to the job being in jeopardy if Prata did not sign nor did Prata give any explanation for this remark.

8. Luigi Caccavo who is employed as a burner and welder was also subpoenaed by the respondent. He also stated that Daniels had asked him to join the union and had told him it would cost \$1.00 at the time or \$150.00 after the union got in. Caccavo signed a card. He said this was because Daniels had said it would be better to sign then than pay the \$150.00 later.

9. Donato Bascio, a welder who was also called by the respondent, simply testified that Daniels who he said checked the welding, had asked him to join the union and he had done so. He made no mention of any reference by Daniels to paying \$1.00 now or \$150.00 later.

10. Frank Keogh who works in the yard of the respondent’s plant appeared under a subpoena taken out by the respondent. His testimony was that Daniels had told him of the option. He said that if Daniels had not mentioned the option, he, Keogh, did not know if he would have joined the union right away. The matter was pursued no further and it leaves the matter open to the conclusion that it was really a matter of timing rather than intent on Keogh’s part that was affected by Daniels’ remarks.

11. The last witness called by the respondent was James Carr. He said that Daniels had asked him to join the union and that he had said it would require \$1.00 to join now but

\$150.00 later. This witness questioned Daniels as to what the union was going to do for the employees. He paid his dollar to Daniels later on. His evidence was that "in a sense" the statement had something to do with signing the card. Later in his testimony he said that the majority were in when he signed. He added, "Mainly, in a sense, that's why I signed, the majority was in".

12. Daniels testified that he was not a professional union organizer, that he got no instructions from the applicant with respect to how to conduct the campaign and that he had signed the majority of the employees. This amounted to 33 members out of a work force of 34. He denied saying that there would be a charge of \$150.00 for late signing and that it was not until he was shown the allegations at the hearing that he was aware of any accusations having been made in that respect. He said that he knows Caccavo, Prata and Basco who are all related one way or another. He recollected approaching all of them about the union at the same time and that they all signed at the same time. He testified that they were mad at him because he had been at the plant for so long and because of their seniority should have been approached first. He denied making any reference to the \$150.00 or \$250.00 late joining charges.

13. There is thus a clear conflict in the evidence as to whether Daniels did say to at least some of the employees that they could join now for \$1.00 and that it would cost them \$150.00 later.

14. We propose to deal with the matter upon the assumption that Daniels did make that statement. We have already found that there are no reasonable grounds that support the allegation that Daniels could be seen by employees to exercise effective authority. We also have evidence which establishes beyond question that Daniels is not an official union organizer but rather that he is a run-of-the-mill employee. It is further clear that Daniels made no direct reference to there being any possibility of loss of employment if the employees did not join. Although the evidence makes reference to the individual witness' reaction to the words alleged to have been spoken, the true test applied by the Board remains objective.

15. In the *Crenmar Services Limited* case, [1978] OLRB Rep. Jan. 48 the board dealt with a situation where an employee was told that he could sign at the time for \$2.00 but that once the union got in it would cost up to \$150.00. The employee stated that it was the reference to the money which caused him to sign the application for membership.

16. In the *Crenmar* case *supra*, the Board pointed out as a significant element the fact that the statement concerning membership dues was made not by an official of the union but, rather, by an employee in the bargaining unit. The Board said that employees hearing statements by rank and file employees concerning what a union might do in the future can always check out the accuracy of these statements with a responsible union official before signing a membership application.

17. In the course of its decision in the *Crenmar* case *supra*, the Board dealt with the *Alex Henry & Sons Ltd.*, case, [1977] OLRB Rep. May 288 in which a statement was made by a professional union organizer that the employees could join for \$2.00 at that time but that it would cost them \$50.00 at a later date. The Board in the *Alex Henry* case found that such a statement did not amount to a violation of section 61 of the Act but that, since it was

made by a union official, it might lead a reasonable employee to conclude that upon certification of the union he would have no alternative but to pay the higher fee if he wanted to keep his job. A vote was directed in view of the doubt raised with respect to the evidence of membership caused in the circumstances.

18. The Board in the *Crenmar* case *supra* distinguishes the *Alex Henry* case *supra* on the grounds that the facts in its case disclose the statement was made by a rank and file employee and not by a union official. The membership evidence was accepted and a certificate was granted.

19. In the case before us the statement was not made by a union official but by a fellow employee. The fact that he was organizing the applicant union does not alter his status as a rank and file employee and would not influence any reasonable employee as a professional organizer who made similar statements might well do. The Board adopts the statement in the *Crenmar* case referred to above concerning the ability of any reasonable employee to check out such statements with the union concerned.

20. In the present case, having considered all of the evidence, the Board finds that there has been no violation of sections 61 and 62 of the Act as alleged and that the membership evidence is not affected by the organizing techniques of Daniels, assuming them to be as alleged, so as to cause the Board to reject the evidence and call for a vote.

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24. A certificate will issue to the applicant.

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**1722-79-R Canwood Lachute, Division of York Transport Equipment Ltd., Applicant, v. Local Union 2557, United Brotherhood of Carpenters and Joiners of America, respondent.**

**Termination – Union certified in April – First meeting held in September – Union failing to attend second meeting – No explanation for Union's failure to communicate or meet since September – Termination declaration issuing**

**BEFORE:** R. A. Furness, Vice-Chairman and Board Members H. J. F. Ade and C. A. Balentine.

**APPEARANCES:** Michael Gordon and Anthony Ogden for the applicant; no one for the respondent; Michael G. Horan, Susan Hunter, Shelly Clement and James Piggott for a group of employees.

**DECISION OF THE BOARD;** December 27, 1979

1. On December 6th, 1979, the applicant filed this application under section 51 of *The Labour Relations Act* requesting a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.



2. On April 20th, 1979, the Board issued a certificate to the respondent with respect to a bargaining unit defined as "all employees of Canwood Lachute, Division of York Transport Equipment Ltd. in Orillia, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff". On May 18th, 1979, the applicant received a letter from the respondent which invited the applicant to discuss negotiating a collective agreement. The applicant and the respondent met on September 13th, 1979, and a further meeting was arranged on the applicant's premises for September 25th, 1979. However, the respondent failed to attend this meeting. The respondent has not offered any explanation for its absence and has not contacted the applicant since September 13th, 1979.

3. The respondent has met with the employees in the bargaining unit on two occasions. On May 31st, 1979, Mrs. Clement was added to the negotiating committee and early in June of 1979 there was a further meeting. Towards the end of September of this year, the respondent distributed an open letter to the employees of the applicant and to the employees of another employer. This letter appealed to the employees for support and gave notice of a meeting in Orillia on October 2nd, 1979.

4. The employees who are affected by this application have not received any further contact from the respondent after the open letter and the notice of a meeting. Both the employees and the applicant have been operating under difficult circumstances. The employees received their last increase in wages in November of 1978 and their wages and conditions of employment have been frozen since that time. This state of affairs has resulted in a loss of employees by the applicant and a decline in its production. The employees have previously attempted to terminate the respondent's bargaining rights, have formed their own committee and have refused to work overtime because of the wage rates. The employees support this application and have filed a statement of desire in which they state that they no longer wish to be represented by the respondent. This statement of desire has been signed by all of the employees in the bargaining unit.

5. The respondent has neither replied to this application nor attended at the hearing of this application. There is nothing before the Board which in any way explains the conduct of the respondent.

6. The respondent has not offered any satisfactory explanation for its delay in continuing negotiations. Having regard to the principles set forth in the *Dominion Stores Limited* case, 56 CLLC ¶18,047, and pursuant to the provisions of section 51(2) of the Act, the Board finds that the respondent has allowed a period of sixty days to elapse during which it has not sought to bargain. In the exercise of its discretion under section 51(2) the Board declares that the respondent no longer represents the employees in the bargaining unit set forth in paragraph two.

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**1411-79-R** Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **C.D.C. Holdings Limited**, Respondent, v. Engineering Constructors Association, Intervener.

**Certification – Collective Agreement – Trade Union Status – Employer’s payroll clerk issuing Union membership cards and check-off forms – Collective bargaining relationship previously established – General Manager of Employer formerly truck driver and president of intervener – Whether trade union status or collective agreement affected**

**BEFORE:** E. Norris Davis, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

**APPEARANCES:** *Ken Petryshen and Don Swait for the applicant; G. Grossman, V. S. Simpson and G. Barnes for the respondent; L. D. Smith and Mrs. Taylor for the intervener.*

**DECISION OF THE BOARD;** December 4, 1979

1. This is an application for certification.
2. Swift Sure Courier Service Limited is a wholly owned subsidiary of C.D.C. Holdings Limited and has no employees. The persons who are the subject of this application are all employees of C.D.C. Holdings Limited, and the style of cause is accordingly amended by striking “Swift Sure Courier Service Limited” as a respondent and replacing therefore the name of “C.D.C. Holdings Limited”.
3. It is the position of the respondent and the intervener that the current application is barred because of an existing collective agreement which commenced to operate April 1, 1978 and which will continue in force until April 1, 1981. The applicant takes the position that the intervener has not previously established its status as a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* and should be required to do so before being accorded status to intervene. The applicant also takes the position that in the absence of such proof of status the alleged collective agreement cannot be a bar to this application, and alternatively, that the alleged collective agreement is one which should not be deemed to be a collective agreement for the purposes of the Act as is provided by section 40 of the Act.
4. The intervener filed with the Board a copy of the Minutes of a Special Meeting of “Clairson Employees Association” held July 12, 1968 for the purpose of effecting a change of name to “Engineering Constructors Association” and some other changes to the then Constitution. These changes were approved and a copy of the amended constitution was also filed with the Board. The intervener filed a copy of the collective agreement above referred to and a copy of the predecessor collective agreement running from April 1, 1975 to April 1, 1978.
5. The intervener further filed a copy of the Board’s decision dated October 18, 1966 (Board File #12279-66-R) dismissing an application for certification by International Union of Operating Engineers, Local 793 on the grounds that it was untimely: Clairson Employees

Association was an intervener in that proceeding. The intervener also filed a copy of the Board's decision of September 15, 1967 dismissing an application for certification by the United Brotherhood of Carpenters and Joiners of America in which Clairson Employees Association intervened, and the Board there found "the agreement dated March 1st, 1967 between the respondent and the intervener is a collective agreement and that the application is accordingly untimely".

6. The Board made an oral ruling at the hearing that, in view of all the representations before it, the Board was satisfied that the previous decisions of the Board constituted a finding that the intervener was a trade union within the meaning of the Act and that such finding constituted prima facie evidence in the current proceedings, and that the onus of rebutting such prima facie evidence as to the status of the intervener or to challenge the collective agreement itself lay upon the applicant.

7. Two former employees of the respondent, who were hired in the latter part of 1977 and whose employment was terminated in November 1979, testified that at the time of their hiring they had completed an application for membership in the intervener. The application form was given to them by the respondent's Payroll Clerk together with various other forms and/or information. The application forms were filed with the Board bearing the signatures of the employees which were witnessed. Mr. V. S. Simpson, President of the respondent testified that this was part of the normal employment procedure and that in all cases the procedure required that the witness to application forms be a member of the intervener. The witnesses subsequently received a membership card bearing their name certifying them to be "a dues paying member in good standing of Engineering Constructors Association" and ostensibly signed by an officer of the intervener: such cards were included with their pay cheques. Simpson testified that the standard procedure was for the intervener to provide a supply of signed membership cards to the Payroll Clerk for future issuance as required.

8. In the case of one witness the membership card received by her bore the signature of "William Brown" over a printed title line consisting of "President or Secretary". The evidence establishes that Wm. Brown had been employed as a driver for a number of years and had occupied the post of President of the intervener. The evidence also establishes, on the balance of probabilities, that Brown was in fact General Manager of the respondent at the time this particular membership card was issued by the Payroll Clerk.

9. Both witnesses testified that they paid monthly dues by payroll check off throughout the period of their employment, and one witness testified she had also paid a \$10.00 initiation fee. The witnesses testified that they had never attended a meeting of the intervener nor were they aware of any notices calling such meeting: one witness testified there was only one bulletin board in the premises and she had never seen any notices of any kind posted by the intervener. The other witness however testified that there were four bulletin boards, and Simpson testified that one bulletin board was allocated for the intervener's use and that he had observed material of the intervener posted on such board. Neither witness had ever seen a copy of the collective agreement and were unaware as to the existence of any representative of the intervener. One witness when asked if she knew whether the Association was in existence, replied, "It seemed to be".

10. Simpson testified to having participated in negotiations for renewal of the collec-



tive agreement which expired in 1978, and identified the renewal contract bearing his signature. Simpson also identified the signatures of either Company personnel and of persons signing on behalf of the Association.

11. The applicant argues that the foregoing evidence, together with the lack of positive evidence demonstrating that the respondent's constitution had been complied with in ratifying the collective agreement and in holding an annual meeting, establishes that no viable organization of employees is in existence, and that additionally the membership card issued over Brown's signature at a time when he was a representative of the respondent calls into operation section 40(a) of the Act invalidating the collective agreement which section reads:

"An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union;"

12. The Board is of the opinion that the evidence of the two employee witnesses does little more than establish their own lack of knowledge in certain areas. Additionally, if one accepts some lack of compliance with constitutional requirements, some failure to hold meetings or to actively police the collective agreement, these facts justify an inference that the quality of representation being supplied by the intervener may indeed be of a low standard, but in the face of continued dues check off and a recent re-negotiation of the collective agreement does not justify an inference that the Association is not a viable entity.

13. The Board is also of the opinion that no inference can be drawn of employer participation in the administration of the intervener or of employer financial or other support can be drawn from the fact that the employer has made certain services available through its Payroll Clerk. Such an arrangement between a bargaining agent and an employer is by no means unusual, and is part of the terms of the negotiated collective relationship. As to the membership card bearing Brown's signature, it is our view, that in the context of the procedures testified to, it is indicative of an administrative error within the procedure and not indicative of Brown, as General Manager of the respondent, participating in the administration of the union.

14. The Board therefore finds that the applicant has failed to rebutt the prima facie evidence of the intervener's status, or to establish that the agreement is not a collective agreement within the meaning of the Act, and therefore a bar to the instant application.

15. The application is dismissed.

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**0856-79-U; 1009-79-U** Service Employees Union, Local 210, Affiliated with Service Employees International Union, A.F.L.-C.I.O.-C.L.C., Complainant, v. **Central Park Lodges of Canada**, Respondent v. Patricia A. Marion, Kathleen Birch, Ruth Pentz, Brenda A. Keen, Frances Walsh and Helen Labbee, Interveners.

**Discharge For Union Activity – Employer intending to gradually eliminate bargaining unit jobs – Employees refusing to co-operate after issuance of “no-board” report – Employer changing policy and terminating all bargaining unit employees – Whether anti-union motive – Whether discharged for exercising rights under Act**

**BEFORE:** G. Gail Brent, Vice-Chairman and Board Members D. B. Archer and J. A. Ronson.

**APPEARANCES:** *Ted Wohl and Tony Borg for the applicant; John O'Donoghue and others for the respondent; P. A. Marion for the intervener.*

**DECISION OF THE BOARD;** December 4, 1979

1. These are two complaints before the Board both of which arise out of the same facts. By agreement of the parties, the evidence relating to the two complaints was heard together and only one award will be issued.
2. The complainant has alleged that the individual grievors have been dealt with by the respondent contrary to *The Labour Relations Act* and that the Respondent has failed to bargain in good faith contrary to section 14 of the Act.
3. There are certain facts contained in paragraph 7 of the complaint in File No. 1009-79-U which were agreed by the parties. These are reproduced below:
  - “(1) The complainant trade union was certified on March 16, 1978 as the sole bargaining agent for all Registered Nurses, by The Labour Relations Board.
  - (2) The grievors are all Registered Nurses and are all the members of the above mentioned Bargaining Unit.
  - (3) The current Collective Agreement between the complainant trade union and the respondent expired on April 30, 1979.
  - (4) The complainant trade union gave notice to bargain on April 5, 1979. The only negotiating meeting took place on May 17, 1979 and conciliation took place on July 3, 1979.
  - (5) Following negotiations and conciliation a No Board Report was issued on July 17, 1979.
  - (6) No Collective Agreement is now in operation.

- (7) The complainant trade union through its President, Tony Borg, with the abovementioned notice to bargain forwarded copies of its proposals to the respondent.
  - (8) The complainant trade union is also the certified bargaining agent for the service unit of the respondent in Windsor. Except for the hiring in June of 1979 of two registered nursing assistants as vacation relief for vacationing registered nurses there has never been any registered nursing assistant in the said service unit."
4. It is further agreed that all eight grievors were given notices of indefinite lay off on or about August 3, 1979 and that none of them has been recalled.
5. The parties also agreed on the following:
  - (a) There are Registered Nurses but not only Registered Nurses exclusively employed in the thirteen retirement homes owned by the respondent and in the three which the respondent manages. In two of the retirement homes which the respondent manages there are no Registered Nurses. (The respondent is in complete control of the homes it manages.)
  - (b) There was no written application for mediation.
  - (c) The respondent made two proposals during negotiations. They were:
    - (1) Change of hours to 80 hours per two week pay period.
    - (2) Replacement of Registered Nurses with Registered Nursing Assistants by attrition.
  - (d) All Registered Nurses have now been replaced by Registered Nursing Assistants.
6. From the evidence of all of the parties who were present at the negotiations and conciliation, it is obvious that the respondent made it known from the start that it had determined as a matter of company policy that Registered Nurses would be replaced by Registered Nursing Assistants for budgerary reasons. It is also clear from the evidence of the company's witnesses and from that of Ms. Calibaba, one of the grievors, that Ms. Duncan, the respondent's original director, did not at any time say that the grievors would be discharged but rather that she affirmed the reasons for the change and stated that the respondent could implement its policy through attrition.
7. At the first negotiating session, the representatives for the respondent did state that agreement was needed to the respondent's proposals before any discussion could take place concerning the complainant's proposal. In view of the fact that one of the respondent's proposals concerned a change in hours, it would appear sensible to attempt to resolve that before discussing matters proposed by the complainant which depended on the maintenance of the status quo. The complainant apparently did not discuss the respondent's proposals but pressed the respondent to deal with its proposals which are reproduced below:



“Article 13.04 We propose that this article be changed to provide one year seniority after completion of 180 tours (currently 220 tours)

16 We propose that a half time R.N. be hired for the afternoon shift.

#### 15. SICK LEAVE

We propose as follows:

1. 1½ days a month.
2. Maximum accumulation of 150 days.
3. Cash-out on termination of employment.

#### 17. HEALTH AND WELFARE BENEFITS

We propose that the employer provides coverage under the Green Shield Dental Plan for Nurses of the bargaining unit and to pay 100% of the premium.

#### 18. VACATIONS

4 weeks vacation after 4 years seniority.

#### 19. PAID HOLIDAYS

One extra paid holiday (Anniversary Day).

We wish to discuss the following two matters:

1. Wearing of hairnets.
2. Malpractice Insurance.

#### SALARIES & TERM

1 year contract. We propose that the grid level be increased to 5 years.

Salary increase: 70 cents per hour.”

8. The respondent did reply by saying that the seniority issue depended on the resolution of the hours proposal, offering an improvement in sick leave accumulation, agreeing to provide a copy of its malpractice insurance, and saying it was not prepared to agree on the other matters. The respondent also proposed a two year term and neither party discussed salaries at all.

9. At conciliation the respondent maintained its position regarding its two proposals which it considered to be fundamental. The complainant trade union offered to accept the change in hours if the respondent abandoned its policy of replacement of Registered Nurses

with Registered Nursing Assistants through attrition. There appears to have been some perception on the part of the respondent's witnesses that the complainant trade union wanted the collective agreement to state that Registered Nursing Assistants would not be hired to replace Registered Nurses.

10. At the conciliation meeting there was some discussion between Ms. Duncan, who is herself a Registered Nurse, and Ms. Calibaba, one of the grievors, concerning the liability of Registered Nurses. From their accounts it would appear that it was made clear at that time that Registered Nursing Assistants were qualified to work in a Retirement Home setting and that no teaching or nursing skills would be required of the Registered Nurses.

11. It seems a fair assessment of the situation to state that the parties had reached an impasse over the question of Registered Nursing Assistants and that the complainant was fully aware that the respondent intended to implement its policy of hiring Registered Nursing Assistants to do the work then being done by the Registered Nurses. It would also be reasonable to conclude that a reasonable person in the position of the grievors would conclude that if she failed to co-operate with those hired in the respondent's exercise of its right to implement the policy of hiring only Registered Nursing Assistants, then her job might well be in jeopardy.

12. Prior to August 3, 1979 two Registered Nursing Assistants were hired. Ms. Wurtz, the respondent's assistant manager in Windsor, testified that she received complaints from both of them to the effect that they were not being oriented by the Registered Nurses, that they were not being introduced to the guests residing in the lodge, that they were being left out of reporting sessions, and that they were being generally ignored. Ms. Wurtz did not investigate any of those complaints. At all material times Ms. Wurtz was aware of the Registered Nurses' concerns about teaching the Registered Nursing Assistants and the Board accepts that she made it clear that she expected no teaching skills but rather the same sort of orientation and introduction to the routine that one would provide any new qualified nurse coming on staff.

13. It is obvious from the evidence presented by the complainant that the word "teach" was being used by some of the grievors to include activities which the Board would conclude as coming within the ambit of orientation or introduction to the routine. It is also reasonable to conclude from the evidence that some of the Registered Nurses resisted the introduction of Registered Nursing Assistants to the extent that they were not willing to accept that the R.N.A. could perform functions which she was qualified to perform according to the regulations of the College of Nurses.

14. The respondent decided to lay off all of the Registered Nurses indefinitely because it determined that the attitude of the Registered Nurses in the Windsor lodge was such that they would not co-operate with the gradual introduction of Registered Nursing Assistants and because it foresaw the situation deteriorating over time. There was also evidence to the effect that some of the guests were becoming involved in the matter and on at least one occasion a guest had to be re-assured by a member of management that a Registered Nursing Assistant was qualified to give the required care.

15. Neither the letters to the grievors nor the reply to the complaint suggests that the respondent is relying on anything other than its policy of replacing Registered Nurses with

Registered Nursing Assistants as the reason for the indefinite lay offs or dismissals. In fact, the reply states that the respondent would consider recalling the grievors if the “experiment” concerning the use of Registered Nursing Assistants were to fail.

16. This is a very difficult case to deal with in human terms. Regardless of what decision is reached, a group of people will find themselves out of work. That is essentially why the interveners appeared before us, and while their position gives them status we cannot be influenced by their plight in reaching a decision on the merits.

17. On the evidence before us the Board cannot conclude that the respondent failed to bargain in good faith. The respondent clearly stated its policy concerning future staffing to the complainant rather than try to lure the complainant into a collective agreement for a bargaining unit which was bound to disappear in time. Indeed, had the respondent not disclosed its policy the complainant would likely have been before the Board alleging a failure to bargain in good faith. There was no refusal to negotiate by the respondent, and its reluctance to deal with some issues until other “must” issues were resolved was not unreasonable given that the complainant’s proposals were all related to costs or the resolution of the hours of work issue. There was never any threat to discharge made in the course of negotiations and there was never a denial of the complainant trade union as the bargaining agent of the employees.

18. The complainant trade union represents both the service unit and the nursing unit in the respondent’s Windsor lodge. Regardless of the outcome of this case, it will still hold those bargaining rights and it will represent any Registered Nurses or Registered Nursing Assistants employed by the respondent. Accordingly, no injury to the complainant trade union can be shown here.

19. The Board does not consider that the grievors were dismissed because of any misconduct on their part. Indeed, a perusal of the evidence and argument does not disclose that the respondent accused each Registered Nurse of some definable misconduct. Indeed, as nurses their records appear to be excellent and there is no record of any disciplinary action ever having been taken against any of them. If indeed the respondent was arguing that it had just cause for discharging the grievors, then its failure to investigate any allegations made by the Registered Nursing Assistants would indeed have been regarded as highly unreasonable. The only question before the Board is whether the grievors were discharged in whole or in part because of union activities. The union activity which counsel for the complainant was referring to was the refusal to agree to the respondent’s proposal regarding replacement by attrition.

20. The Board does not consider the cases dealing with discharge for union organizing activity terribly helpful to it. The situation here is entirely different. The complainant trade union has been certified for some time and a first agreement was negotiated without any allegations of bad faith. The complainant trade union has also dealt with the respondent as bargaining agent for the service unit for some time. There is no suggestion of any anti-union animus or activities on the part of the respondent. On the basis of the evidence before us, the Board concludes that the only reason for the grievors’ indefinite lays offs was the respondent’s announced decision to replace Registered Nurses with Registered Nursing Assistants. The reason for the change in implementing the policy the Board accepts as the respondent’s perception that the gradual introduction of Registered Nursing Assistants as



vacancies occurred would not work under the circumstances. Whether this perception was right or wrong, or whether any or all of the grievors were responsible for this perception is immaterial. The Board is satisfied that the grievors were not discharged, in whole or in part, because of any union activities or just because they refused to agree with the respondent's attrition policy.

21. Having regard to the foregoing, these complaints are hereby dismissed.

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**1295-79-R** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Chemtrusion Inc.**, Respondent.

**Certification – Charges – Membership Evidence – Organizer present during meeting of employees – Advising that employees failing to join Union would lose jobs – Whether employees voluntarily desiring union representation – Membership evidence given no weight**

**BEFORE:** Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine

**APPEARANCES:** *Ken Petryshen and John Watson for the applicant; R. C. Filion and others for the respondent.*

**DECISION OF THE BOARD;** December 11, 1979

1. This is an application for certification.

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4. The applicant filed evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit. However, it is the respondent's contention that the Board should give no weight to any of the membership evidence but instead dismiss the application. This contention is based on certain statements allegedly made to a number of bargaining unit employees by Mr. John Watson.

5. Mr. Watson is neither an employee of the respondent nor a paid union official. Instead he is an employee of another company where the applicant holds bargaining rights. Mr. Watson is desirous of becoming actively involved in union work and to this end he has been involved in two organizing campaigns, including the one leading up to the filing of the instant application. Mr. Watson acted as the collector of all of the membership cards filed by the applicant in support of this application.

6. Shortly after the end of the working day on Friday, September 28, 1979, Mr. Watson met with approximately ten of the thirteen employees in the bargaining unit. Mr. Watson brought with him a number of blank union membership cards. Originally the meeting had been scheduled for the applicant's offices in Mississauga, but since all of the meeting

rooms in the office were locked, the meeting was actually held next to Mr. Watson's car in a nearby parking lot. Mr. Watson made no formal address to the employees, but did discuss the union with them and answer questions put to him. On the basis of the testimony at the hearing and the membership evidence filed in support of this application, we are satisfied that seven employees signed union membership cards at this meeting. The applicant filed evidence of membership on behalf of a total of eleven employees.

7. Mr. Larkin Pitter, an employee in the bargaining unit who attended the meeting on September 28th, testified on behalf of the respondent. Mr. Pitter testified that at the meeting Mr. Watson stated that anyone who did not sign a union card would be fired when the union got in. Mr. Pitter further added that it was this statement on the part of Mr. Watson which caused him to sign a union card. Mr. Pitter's testimony was not shaken during a lengthy and vigorous cross-examination by counsel for the applicant.

8. Counsel for the applicant called Mr. M. Bagshaw to testify concerning the meeting in the parking lot. Under cross-examination Mr. Bagshaw acknowledged that at the meeting it was stated that any one who did not sign a union card would lose his job. Mr. Bagshaw indicated that he did not know if Mr. Watson was one of those who actually made such a statement, but Mr. Bagshaw did say that he heard Mr. Watson agree with some employees who commented that if they they did not join the union they would not be working for the respondent. Mr. Bagshaw testified that during the meeting he received the impression that you had to sign a union card or be out of a job.

9. Mr. Watson also gave evidence before the Board. Mr. Watson testified that at the meeting he did not state that employees who did not sign a union card would lose their jobs. Mr. Watson further stated that he heard no one else make such a statement.

10. In light of the testimony of both Mr. Pitter and Mr. Bagshaw we are unable to accept Mr. Watson's evidence with respect to what was said at the meeting on September 28th. We are satisfied that at a minimum Mr. Watson agreed with the proposition that employees who did not join the union would be out of a job.

11. Section 38 of the Act provides that under certain circumstances a collective agreement can require union membership as a condition of employment. However, such a requirement can generally only be included in a collective agreement after a clear majority of the employees have already voluntarily selected the trade union as their bargaining agent. The use of threats of loss of employment by either the employer or the trade union simply has no place in an organizing campaign. In our view such a threat offends the prohibition against intimidation or coercion contained in section 61 of the Act.

12. It has long been the Board's practice not to give any weight to membership evidence obtained by the use of threats of loss of employment. See *L. M. Welter Limited*, [1965] OLRB Rep. April 34 and *Intermodal Marine Surveys Ltd.*, [1979] OLRB Rep. April 321. In the instant case, Mr. Watson, at a minimum, agreed with the proposition that employees who did not join the union would be out of a job. Mr. Watson at the time was acting on behalf of the applicant, and would have been perceived by the employees as a representative of the applicant. In these circumstances employees at the meeting on September 28, 1979 may have signed cards out of concern for their jobs rather than because they voluntarily desired to be represented by the applicant. Accordingly, we are unable to give any weight to

the membership evidence signed at this meeting. There is no need to make any determination with respect to the weight to be given to the remaining membership evidence.

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14. The application is accordingly dismissed.

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**1509-79-U** Dennis H. O'Keefe, Complainant, v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880, Respondent, v. **Concrete Construction Supplies**, Intervener

**Charges – Practice and Procedure – Section 79 – Earlier identical complaint dismissed after hearing – Issues raised in fresh complaint *res judicata* – Dismissal without hearing pursuant to Rule 46**

**BEFORE:** George W. Adams, Chairman and Board Members J. D. Bell and O. Hodges.

**DECISION OF THE BOARD;** December 28, 1979

1. The Complainant has filed a complaint with the Board pursuant to section 79 of *The Labour Relations Act* alleging that he was dealt with by the Respondent trade union contrary to section 60 of the Act.

2. The Complainant states in paragraph 4 of his complaint (Form 32):

“On or about 24 August 1977 the grievor was dealt with by Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880 (Pres. W. May) of the respondent contrary to the provisions of section sixty (60) of The Labour Relations Act in that he did on his own behalf or on behalf of the respondent:

Failed to present evidence to reverse a dismissal order received by me on the 22 March 1977.

Failed to uphold the terms and intent of the union contract.

Allowed false evidence to be entered into the record.

Failed to take action to reverse the decision of a arbitration hearing held on the 24 August 1977 upholding my dismissal.”

3. The Complainant had filed a complaint earlier with the Board pursuant to section 79 alleging that the Respondent had dealt with him contrary to section 60 of the Act. (See Board File No. 1280-78-U). That complaint proceeded to a hearing before the Board (differently constituted) on July 26, 1979. By decision dated August 23, 1979, [1979] OLRB Rep. Aug. 739, the Board, in dismissing the complaint, reviewed and summarized the evi-



dence and the representations of all of the parties, and in so doing set out the Complainant's position in the following terms:

"At the request of the Board the complainant stated that the essence of his complaint against the respondent union was that on or about December 14, 1976 Mr. Doe made promises and statements to him concerning an 'Infraction-Lay Off-Discharge Report' given to him by the company on November 17, 1976. Those statements concerned the status of the report as disciplinary action taken against him and the alleged promise was that the respondent union would fight the report 'in every court in the land' if it was held against him by the company. The essence of the complaint is that the respondent union allegedly lied to the complainant and failed to keep this promise when the report was used as part of the complainant's disciplinary record in a subsequent arbitration concerning his discharge. The hearing in that arbitration took place on August 24, 1977; the decision was communicated to the parties on October 26, 1977; and the written reasons for the majority decision were released on January 16, 1978."

The Board recorded in that decision the following findings of fact based upon the evidence presented to it at the hearing of July 26, 1979:

"The facts in this case are not seriously in dispute. On November 17, 1976, the complainant was given an 'Infraction-Lay off-Discharge Report' (Exhibit #1). The complainant filed a grievance (Exhibit #2) and the respondent union notified the company that it would be proceeding to arbitration in the matter (Exhibit #3). Sometime later, possibly on December 13, 1976, the complainant was asked to come to the union offices to meet with Mr. Doe, the Secretary-Treasurer of Local 880, to discuss his grievance. At that meeting, Mr. Doe took the position that the report given the complainant by the company (Exhibit #1) was not disciplinary, i.e. a reprimand, but simply notice that a rule had been broken. Apparently, this position had also been taken by Mr. May, the union president, when the complainant showed him the report in late November. The position taken by Mr. Doe that day was one which he told the complainant was justified by arbitration cases concerning the definition of 'infraction' and 'reprimand' as used in the collective agreement.

The complainant admitted that he agreed to withdraw the grievance at that time on condition that he would get some sort of letter from the union protecting him and after hearing Mr. Doe assert that the union would 'take the matter before every court in the land' if the company ever tried to use the matter against him. (Mr. Doe said that it is possible that he made this statement about 'every court in the land' so I will accept it as the statement made that day). Subsequently, Mr. Doe wrote to Mr. John Toneatti, the company's manager, with a copy to the complainant (Exhibit #4) setting out the union's position concerning the grievance and infraction and withdrawing the grievance.

Unknown to Mr. Doe, Mr. Toneatti had written to the complainant on November 23rd (Exhibit #6) concerning the company's position in the matter. The complainant did not mention the letter to Mr. Doe nor was there any evidence that it ever was placed in the complainant's file. The complainant did copy the letter and place it in the business agent's box at the union offices, but there was no evidence about when this was done. Nevertheless, the union's position throughout was that the company had never done anything but notify the complainant of some sort of rule infraction and had not taken any disciplinary action against him.

There is absolutely no evidence to suggest that Mr. Doe did not seriously consider that this was the correct position to take. Mr. Doe's opinion was based on his interpretation of the company's action and the cases dealing with this language. As a union official, it is not unreasonable for Mr. Doe to make such judgments and express his opinion to those contemplating arbitration. Moreover, the choice concerning the withdrawing of the grievance was left entirely up to the complainant.

When the complainant was subsequently discharged in March, 1977, it became clear again that the company was indeed treating the November report (Exhibit #1) as disciplinary. At the arbitration hearing on August 24, 1977 the union was represented by counsel and the decision of the majority of the board of arbitration makes it clear that counsel argued forcefully that the report of November 17th ought not to be regarded as disciplinary. The decision of the majority rejected this argument and held that there was disciplinary action taken against the complainant. Mr. Doe's evidence was that the arbitration award was studied by Mr. May, the president, by Mr. Holman, a business agent, and their legal counsel. Mr. Doe said that the policy of the respondent is to apply for judicial review if their counsel advises it. No such advice was given here and no application was made by the respondent."

4. The Complainant filed an application for reconsideration of the Board's August decision, which was dismissed by a decision dated September 20, 1979, which stated:

"Upon a careful review of the decision and the application for reconsideration the Board can see no reason for changing its original decision in any way. Accordingly, the application for reconsideration is denied and the original decision is hereby confirmed in every respect."

The Complainant subsequently filed the instant complaint.

5. A comparison of the facts alleged by the Complainant in the instant complaint and the findings of fact made by the Board in its August decision clearly discloses that the Complainant is attempting to relitigate his earlier unsuccessful complaint before the Board. The Complainant is relying upon the acts or omissions of the Respondent which were the subject of an earlier Board proceeding and is requesting that the Board find that the Respondent contravened section 60.

6. Section 95(1) of the Act provides:

“The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is *final and conclusive for all purposes* . . .” [Emphasis added]

In this complaint, the Complainant seeks to have the Board once again determine whether the acts or omissions of the Respondent relating to the Complainant’s dismissal and subsequent arbitration hearing constitute a violation of section 60 of *The Labour Relations Act*. The Board has already determined that the Respondent did not act contrary to section 60 of the Act, and confirmed its decision on reconsideration. The Board’s decision with respect to this matter is “final and conclusive for all purposes.” The Board thus views the earlier findings of fact and law made in its August 23, 1979 decision as determinative of the allegations raised by the Complainant in the instant complaint.

7. In these circumstances, the doctrine of *res judicata* is applicable. The Board has adopted an approach similar to that followed by the courts in applying the principle of *res judicata* to prevent repetitious litigation and to provide finality to Board proceedings. This approach by the Board was set out in the following terms in *Arnolds Markets Limited*, 62 CLLC ¶16,221 where the Board stated:

“It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision.”

More recently, the Board in *Radio Shack*, [1979] OLRB Rep. March 248 applied the principle of *res judicata* in finding that an earlier determination by the Board that the employer had violated the Act could not be put in issue once again before the Board. The Board stated at page 252-53:

“... the Board is satisfied that its decisions of September 27, 1978, October 12, 1978 and December 4, 1978 are *res judicata* in respect of the allegations dealt with therein. The Board is not prepared to allow the issues raised therein to be relitigated as part of the 7a proceedings; rather the Board relies on the fundamental findings of law and fact contained in their decisions which are now a matter of record.”

The application of the principle of *res judicata* by the Board was upheld by the Divisional Court in *Radio Shack v. United Steelworkers of America*, 79 CLLC ¶14, 217 where the court stated:



“The issue is the breach of the Act . . . The Act is a code designed to resolve volatile labour disputes quickly and relatively inexpensively. To apply, as the Board did here, the doctrine of *res judicata*, in a limited way appears to be proper and commendable.”

(See also *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Sept. 722; *Canadian General Electric Company Limited*, [1978] OLRB Rep. April 384; *Re Flavelle Estate*, [1947] O.R. 229 at 241 (C.A.); *Nigro v. Agnew Surpass Stores*, (1977), 18 O.R. (2d) 215).

8. Rule 46 of the Board's Rules of Procedure permits the Board to dismiss a complaint without a hearing where the Board is of the opinion that the Complainant does not make out a *prima facie* case. In the circumstances of this case, the Board is of the view that the complaint does not make out a *prima facie* case inasmuch as the allegations of the Complainant and the issues raised in the complaint are *res judicata*. The matters in issue, having already come before the Board and having been fully litigated on their merits cannot once again be placed in issue by the Complainant. Accordingly, this complaint is dismissed.

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**0701-79-R** United Steelworkers of America, Applicant, v. **ESB Canada Limited**, Respondent, v. United Electrical, Radio & Machine Workers of America and its Local 514, Intervener.

**Certification – Parties – Reconsideration – Intervener seeking reconsideration not party in original proceeding – Intervener not representing any employees in unit – Bargaining agent for employees of employer at different location – Whether having status to seek reconsideration.**

**BEFORE:** Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and D. B. Archer.

**APPEARANCES:** Victor Solomatenko and Cecil Wilton for the applicant; R. N. Gilmore, B. W. Burkett, and others for the respondent; Laurence C. Arnold and Richard Barry for the intervener.

**DECISION OF THE BOARD;** December 27, 1979

1. By a decision dated August 7, 1979 the Board certified the United Steelworkers of America as the exclusive bargaining agent for an all-employee bargaining unit agreed to by the parties at the respondent's location in the City of Woodstock.

2. By a letter dated September 20, 1979, the United Electrical, Radio & Machine Workers of America and its Local 514 (hereinafter referred to as the U.E.) requested the Board to reconsider its decision certifying the Steelworkers for the bargaining unit noted above. Their request for reconsideration is based on the contention that if the Board had been aware of the construction nature of the work performed by the employees in the bargaining unit, the Board would have declined to find appropriate the all-employee bargaining unit agreed to by the parties. The intervener asserts that the Board instead would have

found that a unit defined as “all employees of the respondent at the City of Woodstock engaged in construction work, save and except foremen, persons above the rank of foreman, professional engineers, laboratory technicians, quality control inspectors, office and sales staff and students employed during the school vacation period” was the appropriate bargaining unit. The U.E. further contends that if the Board had been apprised of the fact that ESB intended to substantially multiply its work force in March 1980 when it tentatively planned to begin production, the Board, pursuant to its build-up principles, would have declined to certify the applicant in August, 1979. We note that in this respect the U.E. does not allege that ESB, either at the time of the certification hearing or at the instant hearing, had any plans for an immediate increase in its work force and could not cite any precedent for the contention that an increase in the work force to begin to take place seven months in the future would cause the Board to delay certification.

4. Neither the U.E. nor its Local 514 were parties to the original application for certification and they represent no employees in the bargaining unit at the respondent's plant in Woodstock for which the Steelworkers have been certified as the exclusive bargaining agent. The Board, therefore, called for evidence and argument on the threshold issue of the interveners' standing to make representations relating to the Board's decision to certify the applicant. This is an interim decision directed to that matter.

5. The U.E. represents the employees of ESB at its plant at 633 Warden Avenue in the Borough of Scarborough. On August 8, 1979, ESB announced to its employees that it would be phasing out the Scarborough plant commencing in November, 1979 and concluding in March, 1980. ESB manufactures industrial batteries at its Scarborough plant and will be manufacturing industrial batteries at its Woodstock plant. It is not disputed that production that was being done at the Scarborough plant will ultimately be carried out in the Woodstock plant for which the Steelworkers have been certified.

6. Prompted by rumours, the U.E. made diligent but unsuccessful efforts in June and July 1979 to determine whether the opening of the respondent's new plant in Woodstock would cause the respondent to close its plant in Scarborough where the U.E. represents the production employees. The Board accepts that through no lack of effort they were unaware of the Steelworkers application for certification filed with the Board on July 17, 1979 and were further unaware until the first week of September of the Board's decision to grant certification dated August 7, 1979.

7. In *Essex Health Association* [1967] OLRB Rep. Feb. 885 the Board found that a union had standing to intervene in a certification proceeding because it represented one employee in the bargaining unit in question. The Board stated at page 886:

“It has been the Board's consistent practice to permit a trade union to intervene in an application for certification so long as that trade union could demonstrate that it had an interest in the proceedings even though that interest was restricted to the representation of only one of the employees who would be eligible for collective bargaining in the unit claimed by an applicant”

The U.E. asserts that the Board in *Essex Health Association* cited the representation of one employee as only one example of an interest sufficient to accord a union standing in a certifi-

cation proceeding and left it open to the Board to further detail other sufficient interests on a case by case basis. The intervener contends that in this case it has a special interest which should be deemed by the Board sufficient to accord the interveners standing to make their representations.

8. The U.E. argued that the force of their interest lies in the fact that they are the bargaining agent for the employees at the respondent's Scarborough plant whose jobs at that location will be phased out with the work ultimately being transferred to the respondent's new plant in Woodstock. No production work was being carried on by ESB at its Woodstock plant at the time the Steelworkers organized the employees. Production will not in fact begin until sometime in March, 1980. The employees organized by the Steelworkers were renovating the plant in preparation for the commencement of production. Because the bargaining unit agreed to by the parties and found to be appropriate by the Board was an all-employee unit, it would ultimately encompass employees engaged in production. In these circumstances the U.E. contends that it has been wrongfully foreclosed from an opportunity to organize the employees who will ultimately be engaged by the respondent to do production work at Woodstock. In requesting reconsideration the U.E. alleges that they have a special interest because they represent not simply employees of the respondent in another geographic location but, more specifically, employees at the geographic location which is being replaced by the opening of the location in question in the certification proceeding before the Board. In support of its position, counsel for the intervener cited the Board's decisions in *Northern Electric Company Limited*, [1966] OLRB Rep. May 94 and *Bechtel Canada Ltd.*, [1978] OLRB Rep. May 401.

9. The Board has consistently denied a union standing to intervene in certification proceedings or the reconsideration thereof in the absence of demonstrating that it is the bargaining agent for the employees in the bargaining unit or that it represents one or more persons in the bargaining unit in question. In *Napev Construction Limited*, [1976] OLRB Rep. March 109, the Board at 111 summarized its approach to a union's standing to intervene in certification proceedings:

"Where attempts have been made to intervene in certification proceedings, the Board has consistently held that, in order to safeguard the rights of parties originating proceedings, and with a view to eliminating delay by parties claiming an interest a would-be intervener must meet certain requirements. These requirements are deemed necessary in the field of industrial relations where time is indeed of the essence in order to avoid delay, multiplicity of proceedings and frustration of the purposes of the Act by parties who have no real representative status with respect to the employer and the employees involved. The Board has always required that an intervener must be either an employee in the bargaining unit to which the proceedings relate or a union holding representational authorization from one or more persons in the bargaining unit, or be the bargaining agent for employees in the bargaining unit. In the absence of these requirements, intervention has been denied."

In *Neo Industries Limited*, [1976] OLRB Rep. March 88 the Board emphasized that the nature of the allegation sought to be made by the union attempting to intervene would not affect the application of the Board's general principles for determining whether a union has status to intervene. The Board stated at 90:



“It is thus obvious that the nature of the allegation sought to be made by the party attempting to intervene is not a concern of the Board in determining the primary question of the status of the party seeking to intervene. . . . It is abundantly clear that the party seeking to intervene in proceedings before the Board must be able to demonstrate that it represents at least one person in the bargaining unit with which the Board is concerned before it will be permitted to enter the proceedings, notwithstanding the particular nature of the interest or allegations it seeks to place before the Board.”

10. In enunciating its principles the Board has been precise in stating that the employees represented by the union must be employees within the bargaining unit claimed by the applicant and not some other bargaining unit encompassing employees of the respondent. In *Neo Industries* the Board denied status to the intervenor even though it was a party to a collective agreement with the same respondent for a bargaining unit in a separate geographic location because it failed to establish that it represented an employee in the bargaining unit in question in the application for certification. As well, in *Board of Hospital Trustees of the City of London*, [1970] OLRB Rep. Aug. 579, the Board denied standing to the intervenor who claimed to have an interest in the proceedings because it represented other employees of the respondent who were covered by the collective agreement between the intervenor and the respondent in view of the fact that it did not file any membership evidence on behalf of employees included in the bargaining unit in question in the certification proceeding before the Board.

11. On reconsideration of a Board's decision relating to an application for certification the Board has similarly denied union's standing to bring an application for reconsideration where the union could not establish that it was either the bargaining agent for the employees in the bargaining unit or represented any employees in the unit. In *Neo Industries*, *supra*, for example, the Board denied the intervening union which was not a party to the certification proceeding standing to apply for reconsideration of the Board's decision to certify the applicant because the union failed to establish that it represented any employees in the bargaining unit in question in the application for certification. (See also *Formrite Forming Ltd.*, [1971] OLRB Rep. Feb. 49).

12. *Northern Electric*, *supra*, is one of two cases cited to the Board to support the intervenor's contention that the Board is willing to go beyond a representation interest to other forms of interest in determining whether a union has a sufficient interest to intervene. In *Northern Electric* the Board allowed strangers to the original certification proceeding to make representations in respect of an alleged breach of the silent period prior to a representation vote. This case is readily distinguishable from the facts of the case at hand, however, in that the *Northern Electric* case dealt with whether a union that was not a party to the original certification proceeding could make representations relating to the narrow issues of their alleged violations of the silent period as distinguished from representations relating to the bargaining unit description and the very issuance of the certificate itself. The decision in *Northern Electric* turned on the wording of what is now section 43(j) of the Board's Rules of Procedure which directs “all *interested persons* to refrain and desist from propaganda and electioneering during the day or days the vote is taken and for seventy-two hours before the day on which the vote is commenced”. [emphasis added] The Board determined that “interested persons” within the context of the Rules relating to the silent period was a broad cate-

gory which extended beyond the parties to the certification proceeding to include a union which stood to gain from the outcome of the vote and which was in a position to influence the voters. In view of these distinguishing factors *Northern Electric* provides the U.E. with no support for intervening in the instant certification proceeding.

13. In the second case cited to the Board in support of the position of the U.E., *Bechtel Canada Ltd.*, *supra*, the Board specifically distinguished the situation before it from a certification proceeding emphasizing that the matter before it related to the exercise of the Board's discretion under section 123 of the Act and the power of the Board to purport to bind persons who were not parties to the original complaint under section 123 of an unlawful strike. In further distinguishing the *Bechtel* situation from a certification proceeding, the Board notes the very broad language in section 123(1) of the Act which states that "an interested person" may make a complaint under section 123. As *Bechtel* was not a certification case and emanates from different statutory language, the Board does not regard it as a precedent for altering its well established approach to prerequisites for standing in a certification proceeding.

14. In this case the U.E. was not a party to the original certification proceeding and has not established that it represents at least one employee in the bargaining unit in question in the instant certification proceeding who would be affected by the Board's decision to certify the Steelworkers. Accordingly, the Board concludes that the U.E. is a stranger to the certification proceeding and does not have standing to bring an application for reconsideration.

15. For the reasons set out above the application for reconsideration is denied and the Board's decision of August 7, 1979 affirmed.

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**1366-78-M** Labourers' International Union of North America, Local 1089, Applicant, v. **Foster Wheeler Limited**, Respondent.

**Arbitration – Discharge – Discharge for improperly "brassing out" when leaving construction project – Seriousness of offence considered – Whether mitigating factors present**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members O. Hodges and F. W. Murray.

**APPEARANCES:** *S. B. D. Wahl and R. D'Andrea for the applicant; D. I. Wakely, M. J. Clifford, C. Eames and Thomas Orr for the respondent.*

**DECISION OF THE BOARD**, December 3, 1979

1. This is a referral of a grievance under section 112a of The Labour Relations Act in which the applicant alleges that the respondent has violated clause 22.100 of the collective agreement, by which the parties are bound, when it discharged without just cause the five grievors, Mike Grover, John Stark, Val Neil, Bob Longwell and Frank Vennari, all employ-

ees of the respondent. All five grievors had been employed as labourers and were discharged for alleged improper time-keeping procedures.

2. At the time this application was filed, the respondent was general contractor on the construction of a petro-chemical plant for Shell Canada Limited at Corunna, Ontario. There were some 2,000 tradesmen employed on the project of which approximately 150 were labourers. The project involved building five separate petro-chemical processing units occupying a total area of approximately 600 acres. The respondent's contract with Shell was not what is commonly referred to as a fixed price contract, rather it was one under which the respondent passed along its costs to the client within the terms of the contract. The respondent states that the nature of its contract and the size of the project caused it to employ a time keeping system known as a brass system. It appears that the system gets its name from the use of brass discs approximately one and one-quarter inches in diameter on which is stamped two numbers. One number consists of one or two digits and identifies the trade. The second number is below the first one and identifies the person. An employee picks up his brass as he enters the project at the start of a shift and deposits it as he leaves at the end of the shift. This system was selected because it allows a large number of persons to be cleared on and off the site in a very brief period of time and also provides the basis for the control and charging of wage costs to the various project cost centres.

3. The Board heard detailed evidence from 16 witnesses, the bulk of the evidence having been heard during six days of hearings over a three and one-half month period. There were significant differences and contradictions in the evidence of the respondent's and the applicant's witnesses. The findings of fact herein reflect the Board's assessment of all of that evidence, the reliability of the various witnesses' recollection of events, their demeanor and relative credibility.

4. The brass system operated in the following manner:

- (a) Employees enter and leave the project through walkways, called brass alleys, constructed so that the employees file past a timekeeper in a booth referred to as a brass shack. The timekeeper issues and collects the brass through a window opening approximately 12 inches wide and 30 inches high. At the inside, bottom edge of the window there is a shelf approximately 24 inches long and eight inches deep, with a two-inch re-tainer moulding around it.
- (b) Each trade employed by the respondent is allocated a brass alley and there is one for all employees of sub-contractors on the project, 11 alleys all told. Employees entering the project at the start of the shift ask the time-keeper for their brass by number. As they leave the project, employees deposit their brass through the window opening onto the shelf, in front of which the time-keeper is standing. The time-keeper brushes the brass to one side as it is deposited. When brassing out is completed the brass is hung on a board mounted along side of the window.
- (c) The brass alleys are closed by gates until approximately 6:45 a.m. when they are opened until the start of the shift. They are opened again at



brassing out time, 3:55 p.m. until brassing out is completed. The brass shacks are manned only during the brassing in and out, with one exception. One alley is designated for use when the others are closed and its brass shack is manned from the start of brassing in until the end of brassing out. Employees who arrive after the start of the shift or leave before the end of the shift must use this alley and sign a register in which is recorded the time when they collected or deposited their brass.

- (d) The brass is used for time recording and labour cost recording purposes. The time recording provides the basis for calculating the employees' pay. If an employee's time record contains no report of exceptions, for example, late starts, early finishes or no brass picked up (absence), he will be paid for his regular daily or weekly hours. The cost recording provides the basis for recording the labour costs for the various cost centres or components of the project which the respondent charges back to the client. The checking is done by cost recorders who tour the project during each half of the shift in order to ascertain if employees whose brass has been picked up are working and on which components of the project they are working. While the primary purpose of the cost recorders' checks is for costing, it serves also as another safeguard against time-keeping improprieties. The last check for the day is usually completed at approximately 2:00 p.m.
- (e) Employees are allowed a five minute walk-up time at the end of the shift and after tools have been put away so that, at the 3:55 p.m. brass out time, all but stragglers are congregated in a large area at the brass alley gates inside the project and a roadway leading up to this area. When the gates are opened these employees file through rapidly and are cleared in approximately 10 minutes.
- (f) When new employees start work for the respondent they are issued with their brass and a hard hat and given a booklet entitled "Job Site Rules and Accident Prevention Regulations". At the same time, each of the rules contained in the booklet is explained by means of a slide and sound presentation. The introduction to the booklet contains the following references pertinent to the administration of discipline:

"... the Company establishes the following rules which – together with observing other proper standards of conduct – employees are required to comply with.

An employee who fails to maintain at all times proper standards of conduct or who violates any of the following rules shall subject himself to disciplinary action, including discharge".

There are two references to brassing listed in the job rules. Under the rule "Checking In and Out" it states:

"Brass will be used for safety and security and to check in and out

at starting and quitting time. Each employee must pick up and turn in only his own brass. Employees authorized to leave the plant during regular working hours must sign the register at the time office prior to leaving”.

Again under the rule “Conduct On the Job” it further states:

“Acts of conduct, including but not limited to the following are prohibited:

5. Picking up or leaving any brass except your own.”.

- (g) The day on which the breach of the brassing procedures is alleged to have occurred was a Friday and it involves the improper dropping of brass during brassing out. Several trades finish early on Fridays so that, on the day in question, only three brass alleys were open at brass out time: one for labourers, one for all other trades and one for subcontractors’ employees.

5. On the Friday in question, Mr. Hunter, payroll manager for the respondent, set up a special watch for improper brassing procedures because of an alleged report that three persons were seen leaving the project improperly, or in the figurative parlance of the parties, were seen going over the fence. They were not identified in any manner, even as to whether they were employees of the respondent. Hunter instructed the head time-keeper, Tom Orr, to go to the labourers’ brass shack and to watch for the multiple dropping of brass. He also instructed the time-keepers on the other two brass alleys that were to be used by the remaining trades and the sub-contractors’ employees to keep a close watch for multiple drops. Each of these time-keepers was watching one alley, the labourers’ alley was the only one with two persons watching it. Hunter assigned Orr to the labourers alley because it was manned by a person who was not a regular time-keeper. The respondent augments its regular time-keepers with several persons who do other jobs for the company in order to staff the brass shacks when they are open for brassing in and out, except that the one shack which is open during the entire shift is always manned by a regular time-keeper. While the extra staff are selected for their reliability, Hunter observed that they might not be quite as diligent as a regular time-keeper and, for example, might tend to hang the brass as it is dropped rather than watch the drop.

6. The labourers brass shack was manned that Friday by Theo MacKenzie, a progress recorder for the respondent, and Orr joined her in the shack a few minutes before the 3:55 p.m. brass out time. MacKenzie did not know why Orr was there and his only instruction to her was to clear the brass as it came in. The evidence of both employees establishes without question that there were two multiple drops of brass soon after the brassing out started, separated from each other by a few singles. MacKenzie had been clearing the singles away from Orr to the right hand end of the shelf. Orr cleared the two multiple drops to the end of the shelf at his left. There were three brass in the first multiple drop and two in the second one. Orr took these to Hunter as soon as brassing out was completed keeping the three in one hand and the pair in the other and turned them over to Hunter. Hunter made a list of the numbers and together with Mike Clifford, labour relations manager for the respondent, reported the matter to the project superintendent and discussed it with him. This

discussion resulted in the decision to dismiss the five employees to whom the brass belonged. At this stage the only identification of the employees was that they were labourers because of the trade code on the brass; their names were unknown. The names of the employees were ascertained from the payroll records as being those of the five grievors. The following Monday morning when each grievor reported to the brass shack for his brass, he was given a note instructing him to report to the labour relations office, where all five were advised by Clifford that they were being dismissed for violation of job rule #5.

7. The evidence from which these facts are derived leaves no room for doubt that the brass of the five grievors was improperly turned in at the end of the Friday shift and, accordingly, we so find. On the other hand, there is no direct evidence that any of the five grievors was not present for the entire Friday shift. Thus in these circumstances, the facts support equally either of the two propositions that:

- (a) the grievors worked their full shifts and, for reasons known only to themselves, three of the five arranged for the other two to turn in their brass for them: or
- (b) three of the grievors did not complete the shift, were attempting to obtain payment of wages they did not earn and arranged for the other two to turn in their brass for them.

Whichever proposition represents the actual event, it required the connivance of the five grievors. Furthermore, either proposition constitutes a violation of the job rules in respect of "Checking In and Out" and "Conduct on the Job" prohibited conduct item #5 (see paragraph 4(f) above). Since they have connived in the commission of the offense they are equally guilty of it. Accordingly we find that all five grievors have violated item #5 of the rule in respect of "Conduct On the Job" as alleged by the respondent. It is obvious that the respondent in discharging all five of the grievors has considered them equally responsible for the offense and therefore found it fitting that they bear equally the consequences flowing therefrom. That being the case, does the offense provide the respondent with just cause for discharge? The answer to that question will determine whether the respondent has violated clause 22.100 of the collective agreement which states "The Employer irrevocably agrees that no employee will be discharged or laid off without just cause."

8. This is precisely the issue which the Board must determine; i.e., whether the respondent had just cause to discharge the five grievors because of their improper turning in of brass. Counsel for the respondent argues simply that item #5 of the job rule "Conduct On the Job" which says that "Picking up or leaving any brass except your own." is prohibited, exists to preserve the integrity of the time keeping system which it employs to control the time recording for 2,000 employees (at the time in question) spread over a 600 acre construction site. To this end the rule is intended to discourage conduct which would result in wages being paid for work which was not performed, thus there is no attempt in the rule to distinguish between various kinds of breach. This very nature of the rule demands strict adherence by the employees and strict enforcement by the respondent. In other words, the employee who has another turn in his brass after the employee has worked his full shift has committed as serious an offence as the employee who leaves the project early without signing out and arranges for another to turn in his brass so that he will be paid as though he had been there for his full shift, because both acts are a threat to the integrity of the system and



are a fraud or contain the potential for fraud. Any violation of the rule, therefore, in the respondent's view warrants discharge.

9. Counsel for the applicant argued, should the Board find the five grievors to have engaged in improper brassing procedures, that this offence alone is not just cause for discharge and therefore that penalty should be mitigated by the Board on two grounds. First and foremost on the ground that there is no direct evidence of theft (of wages) from the respondent or that the grievors were conniving with the intent to defraud the respondent. Second, on the ground that the respondent has not established in its booklet containing the job rules that the discipline to be applied to this offence is discharge. Rather counsel contends, the respondent in fact contemplates a spectrum of disciplinary action, including discharge because the booklet states that any employee violating the job rules "... shall be subject to disciplinary action including discharge.". Thus there has been no notice to the employees that a simple breach of the rule against improper brassing will result in discharge.

10. Discipline cases raise two basic questions for the arbitrator: first, whether the facts support the imposition of discipline at all; and second, whether those facts justify the discipline (or penalty) imposed. The facts in this case amply demonstrate that a clear and unequivocal rule which was made known to the grievors has been breached by them, so the basis for imposition of discipline has been established. There remains the second question of whether the penalty of discharge is justified by the facts. If the Board finds that there is not justification, then it has the discretionary authority to substitute another penalty. This discretion is explicitly granted by section 37(8) of the Act pursuant to section 112a(3). The facts demonstrate conclusively that the brass belonging to each of the five grievors was dropped improperly at the end of their shift on the Friday in question. That situation being established, they have a responsibility to give a credible explanation for it. They have failed not only to do that, but throughout their testimony they steadfastly maintained that they had worked the entire shift and at brassing out time had dropped their own brass and only their own brass. The claim that each of them dropped his own brass is not supported by the facts. Their continued insistence that each had dropped his brass when the facts reveal the contrary leads the Board to draw the inference that they were trying to cover up wilful misconduct which was a fraud on the respondent, or an intent to defraud it or which contained the potential for a fraud on the respondent. The Board finds, therefore, that the five grievors were guilty of misconduct warranting discipline. We further find that the seriousness of the offence, having regard to the respondent's reason for adopting the brassing system, the use to which it is put, the precautions taken against possible abuse and the need to deter abuses in a work area of the magnitude involved in this case, is such that discharge is not unreasonable. Accordingly the respondent has not violated clause 22.100 of the collective agreement.

11. It remains to determine whether there are factors which would cause the Board to exercise its discretion to substitute a lesser penalty. Arbitrators have recognized the need to proceed with caution in exercising their discretion, whether they obtain this discretionary authority from section 37(8) of the Act or from the collective agreement, or both. For example the arbitrator stated in *Re National Grocers Co. Ltd. and Retail, Wholesale & Department Store Union, Local 414*, (1975) 10 L.A.C. (2d) (Shime):

"Although we have the necessary jurisdiction under the collective agreement as well as under section 37(8) of The Labour Relations Act, R.S.O. 1970, C. 232, to substitute a lesser penalty, we should only exercise our discretion for sound and judicious reasons."

There are a number of factors which arbitrators may take into account in deciding whether discipline should be mitigated. There are circumstances in this case, however, which raise serious doubt as to whether there are sound and judicious reasons for substituting a lesser penalty. Not only did the grievors maintain at all times that they had turned in only their own brass. They alleged that they were the innocent victims of a scheme of the respondent concocted for the purpose of impressing its client with the security and soundness of its timekeeping system; i.e. as proof that it was not passing along wage costs for unearned wages of absent employees. The alleged scheme was founded on the evidence of two witnesses, one of whom was a grievor, that Orr had told them that he had been instructed to go and "scoop" some brass; in other words, to take the brass of some labourers at random so that they could be disciplined for improper brassing procedures, as an example to the client that the respondent is on the alert. The Board finds this to be without a vestige of credibility on the basis alone of Orr's and MacKenzie's evidence and their demeanor as witnesses. These are extremely serious allegations and the most generous thing that can be said about them is that they were part of a deliberate attempt to mislead the Board.

12. In *National Grocers, supra*, the majority of the arbitration board in declining to substitute a lesser penalty for discharge of an employee for sleeping on the job during his working hours stated: "In view of . . . , the deliberate nature of his offence and especially his attempt to mislead the Board we find nothing that would cause us to substitute a lesser penalty in this case." In *Re Libby, McNeil & Libby Of Canada Ltd. and United Automobile Workers, Local 251*, (1974) 7 L.A.C. (2d) (Hinnegan), the sole arbitrator was determining an issue of just cause for discharge of the grievor for an accident while he was driving a lift truck. No personal injury was involved. This Board finds that case instructive for the arbitrator's views about varying the penalty imposed which he expressed in these terms:

"Further, shortly after the accident, he gave what cannot reasonably be accepted as a true statement of the facts and he maintained the position through the hearing. If an arbitrator were to be inclined to adjust the penalty imposed in such a case as this, he should only do so in my view where the employee in question, at the latest at the hearing, was prepared to admit the true statement of what must have been the facts, thereby showing some remorse for his conduct, and exhibiting some resolve to perform properly in the future. However, *at the hearing, the grievor maintained his highly improbable explanation of how the accident happened* and under those circumstances I am not inclined to vary the penalty imposed."

(emphasis added)

Finally the arbitrator concluded:

"... , his maintaining a denial of improper conduct through the hearing in face of clear evidence obviously inconsistent with his position, removes any inclination one might have had to give him the benefit of the doubt and reduce the penalty."

We find the circumstances surrounding the sustained denial of wrongdoing and the attempt to mislead the Board in our case to differ from the two cases cited above only in the gravity of the circumstances. We can conclude only that the grievors have lied to conceal their

wrongdoing and have accused Orr of being a party to an alleged scheme of the respondent to make them the innocent victims of the respondent's attempt to impress its client. Consequently, for the same reasons given in those two cases, the Board refuses to substitute a lesser penalty in all the circumstances of this case.

13. In the result the grievance is dismissed.

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**1356-79-R** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **G.T. Couriers (416656 Ontario Ltd.)**, Respondent, v. Group of Employees, Objectors

**Certification – Charges – Employer issuing warning letters and threatening to close business – Section 7a applicable where economic well-being threatened**

**BEFORE:** Kevin M. Burkett, Alternate Chairman and Board Members J. D. Bell and Bruce Lee.

**APPEARANCES:** *Ken Petryshen and Don Swait for the applicant; R. G. Dougherty for the respondent; Charles Weatherall for the objectors.*

**DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER BRUCE LEE; December 4, 1979**

1. This is an application for certification.

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4. The applicant trade union submitted 9 membership cards in support of its application. 8 of the cards correspond with the names of the 15 persons listed in Schedule 'A' as coming within the bargaining unit. The "lost card" is that of Mr. G. Hanna who was discharged by the respondent prior to the date of application. The trade union has filed a section 79 complaint in respect of his discharge. If the union is successful in its section 79 complaint and Mr. Hanna is reinstated into his employment he will be considered as an employee as of the date of the application in this matter and the membership support of the union will then be 9 of 16 which would be more than fifty-five per cent of those in the bargaining unit as of the date of application. There was also filed in this matter a statement of desire in opposition to the trade union which bears the signatures of two persons who also signed in support of the trade union. If Mr. Hanna is reinstated the statement in opposition to the union will be a relevant document and if proven to be a voluntary expression of those who signed will cause the Board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote.

5. The union has asked the Board to apply section 7a of the Act in this matter and to proceed with the section 7a matter rather than await the Board's section 79 determination in



respect of Mr. Hanna which will determine if the union is in an outright certifiable position and if the petition is a relevant document. The Board agreed to hear the evidence and argument in respect of the application under section 7a.

6. Section 7a of the Act provides:

“Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

7. G.T. Couriers (416656 Ontario Ltd.) commenced to operate in June, 1979. The company operates a courier service under contract to Loomis Courier Service of Toronto. The evidence establishes that the service now performed by G.T. was carried on by Loomis prior to June, 1979 and that the bulk of the employees who had worked for Loomis now work for G.T. including Miss C. Gagnon, president of G.T. Couriers and Mr. C. Thompson, the secretary of the company. The union commenced to organize the employees of the respondent on or about October 11, 1979. A meeting of the respondent’s employees took place at the Teamsters meeting hall in Hamilton on that day. The evidence establishes that Mr. Ian Batchelor and Mr. Steve Vranic were prime movers behind the drive to organize and solicited other employees prior to and at the completion of their runs during the period October 11-22, 1979.

8. The union filed its application for certification on October 16, 1979. The respondent employer received notice of the application on the morning of October 22, 1979. The terminal date had been fixed for October 24, 1979. Mr. Batchelor was called into the office of Mr. Thompson, the secretary of the company, on October 22nd and given the following letter:

“You are hereby notified that effective this date you are under thirty days’ probation.

Any behaviour on your part deemed by the Company to be detrimental to its smooth operation will be considered as a breach of your contract, and said contract will cease on November 22, 1979.”

Mr. Thompson explained that the letter was given because the drivers were being held up morning and night in conversation with Mr. Batchelor. Mr. Thompson was aware of the union campaign and admitted that he had been advised by certain of his staff that Mr. Batchelor was approaching employees on behalf of the trade union. The Board is satisfied on the evidence that Mr. Thompson asked Mr. Batchelor to “cancel the application” for certification at the time he placed him on probation.

9. Mr. Steve Vranic, who also approached employees on behalf of the trade union, was called into Mr. Thompson’s office on October 22nd and given a letter of probation

framed in terms identical to that given Mr. Batchelor. The Board found Mr. Vranic to be a most credible witness and accepts his evidence that he was told by Ms. Gagnon that he had received the probation letter because of his trade union activities and if he didn't shape up he would be fired. Ms. Gagnon admitted that she may have conveyed her fears that "if unionized, we might not have a company to operate." Mr. Vranic took strong exception to the letter and following a meeting of the employees called by the company the following day his letter was withdrawn.

10. On October 22nd the employees of G.T. Couriers were directed to attend a meeting at the Gulliver's Travel Motel to commence at noon on October 23, 1979. Ms. Gagnon testified that she called the Loomis offices in Toronto when she became aware of trade union activity and that it was at Loomis' request that the October 23rd meeting was called. Ms. Gagnon, Mr. Thompson and Mr. L. Nunez from the Loomis office in Toronto were present. Mr. Batchelor testified that Mr. Nunez told the assembled employees that the company would close the plant down if the union got in and let everybody go. Mr. Vranic testified that Mr. Nunez warned about the union and pointed out that our most important customers would not do business with a trade union and that as a result the Hamilton operation would have to be shut down. Mr. Thompson testified that in reply to a question from a driver, Mr. Nunez referred to the fact that Loomis was not a union company and that some of its major clients were anti-union so that G.T. Couriers might close down or it might stay open. He acknowledged that he couldn't remember exactly what Mr. Nunez had said. Ms. Gagnon testified that she didn't hear Mr. Nunez say that the company would have to close but admitted that it was possible that he did say the company would close if unionized. While the evidence is not totally in conflict, the Board prefers the evidence of Messrs. Batchelor and Vranic as providing the Board with the most accurate account of what transpired at the October 23rd meeting.

11. The Board has long recognized the dominant position of the employer in the employer/employee relationship and has consistently found that threats to the job security or economic well-being of employees which are motivated by an anti-union sentiment are in violation of the Act. The Board stated in the *Viceroy Construction Limited* case [1977] OLRB Rep. Sept. 562:

"The Act recognizes that an employer is in the more immediate position to affect an individual's employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual's employment. Therefore, by the terms of the Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person's job security or conditions of employment when the employer's action is prompted by an anti-union motive, (e.g. section 58 of the Act). For the same reason, by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his view of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security. Such conduct, apart from violating section 56, would be contrary to section 58(c) which provides:

'No employer, employer's organization or person acting on behalf of an employer or an employers' organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.'

The protection of the integrity of the individual's employment relationship is central to the scheme of *The Labour Relations Act*. This Board has consistently found breaches of the Act where statements have been made which threaten an individual's employment, and that has been so whether the threat was made by a union (e.g. *Walter Selck of Canada Limited* [1964] OLRB Rep. 138; *V/R Wesson Limited* [1968] OLRB Rep. Nov. 811) or by an employer (e.g. *Bell & Howell Canada Ltd.* [1968] OLRB Rep. Oct. 695)."

12. In this case the Board is drawn to the inescapable conclusion on the facts before us that the respondent employer has violated the Act. We find that the letters of probation issued against Messrs. Batchelor and Vranic to be individual threats against these two employees which were made, not because of any interference with production, but because they were speaking on behalf of the trade union. We find further that at the meeting of October 23, 1979 Mr. Nunez, as the management spokesman, threatened the job security and the economic well-being of the bargaining unit employees for the purpose of dissuading them from joining a trade union. His comments constitute a blatant attempt to capitalize on the employer's dominant position and to play upon the employee's economic vulnerability. The first condition precedent to the application of section 7a has been met in this case.

13. The Board has stated in a number of cases that certification under section 7a of the Act is an extraordinary procedure which is not applied by the Board in response to all employer violations of the Act during the course of a union's organizing campaign. The Board is empowered to act under section 7a of the Act only when satisfied that the employer has contravened the Act so that the true wishes of the employees are not likely to be ascertained by the taking of a secret ballot vote. In many cases of unlawful activity the exercise of the Board's remedial authority under section 79 of the Act is sufficient to redress the effect of the violation and to thereby permit free expression in any secret ballot vote which may be held. When the employer's unlawful activity has been to make threats upon the economic lives of his employees, as in this case, the Board is of the view that the effect upon those with normal concerns for their economic well-being cannot be erased as would allow free expression. On any objective assessment these types of threats destroy free expression whether by secret ballot vote or otherwise. In cases where the evidence establishes that the employer violation has been to cause employees to equate their decision to unionize with a threat to their economic security the Board must conclude that the true wishes of the employees would not likely be ascertained even by the taking of a secret ballot vote. Unlawful threats of this type were made in this case and accordingly, the Board is satisfied that the second condition precedent to the application of section 7a exists in this case.



14. The first and second conditions precedent to the application of section 7a have been satisfied. The union has filed membership documents on behalf of more than fifty per cent of those in the bargaining unit. Even if the statement in opposition to the union, with its two overlapping names, was proven to be a voluntary expression, the Board would nevertheless be satisfied in the circumstances of this case that the trade union enjoys support adequate for the purpose of collective bargaining. The third condition precedent to the application of section 7a has been satisfied.

15. Having regard to all of the foregoing the Board hereby certifies the applicant under the provisions of section 7a of the Act.

16. A certificate will issue to the applicant.

#### **DECISION OF BOARD MEMBER J. D. BELL:**

1. The majority of the Board has decided that the letters of probation issued on October 22nd to Messrs. Batchelor and Vranic were individual threats for speaking on behalf of the union and that the comments of Mr. Nunez at the meeting of October 23rd threatened the job security and economic well-being of the bargaining unit employees. Therefore the respondent employer has violated the Act and the first condition precedent to the application of section 7a has been met.

2. I do not differ with this finding. However, I do not agree that the second condition precedent has been met – the true wishes of the employees are not likely to be ascertained by the taking of a secret ballot vote because of the above violations.

3. The evidence of membership submitted in this application does not support the reasoning of the majority of the Board that these threats have destroyed free expression whether by secret ballot or not.

4. The union applied for certification on October 16th and submitted 6 applications for membership with its application. The respondent filed a list of 15 employees on Schedule 'A'. 5 applications for membership corresponded to the 15 names on Schedule 'A'. The lost card was that of an individual who had been discharged on October 5th and we are advised will be the subject of a section 79 complaint. The position of the application at the time was that of less than forty-five per cent membership support and subject to being dismissed.

5. On October 24th, two days after the warning letters were issued, and the day after the meeting addressed by Mr. Nunez, the union apparently succeeded in obtaining 3 more applications for membership which were submitted on the terminal date. These salvaged their position from 5 of 15 to 8 of 15, i.e. 33.3 per cent to 53.3 per cent which is sufficient for a vote.

6. It appears to me that the acts of the respondent on October 22nd and 23rd had an effect opposite to what the majority deemed would occur and aided the union in obtaining the necessary additional applications for a vote.

7. I would find that the second condition precedent has not been satisfied and would direct the representation vote by secret ballot, to which the applicant union is entitled based on its membership evidence, be held.

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**0938-79-R** Mary Lockwood, Applicant, v. **The Hotel and Restaurant Employees Union Local 743** Affiliated with the Hotel and Restaurant Employees and Bartenders International Union, Respondent.

**Petition – Termination – Whether voluntary – Whether earlier management influence affecting voluntariness**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and H. Simon.

**APPEARANCES:** *James N. Bartlet and Mary Lockwood for the applicant; Stephen M. Grant and Tom Rees for the respondent.*

**DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD AND BOARD MEMBER C. G. BOURNE; December 5, 1979**

• • •

2. In this timely application under section 49(2) of *The Labour Relations Act*, the applicant is seeking a declaration terminating the bargaining rights of the respondent trade union.

3. Section 49(3) of the Act requires that the Board determine the wishes of the employees by means of a representation vote if it ascertains that not less than forty-five per cent of the employees have signified voluntarily and in writing that they no longer wish to be represented by the respondent. To this end, the applicant duly filed with the Board a statement of desire (“petition”) containing signatures indicating the required support. Therefore, if the Board is satisfied that the petition is a voluntary expression of the true wishes of the employees who signed it, the Board will direct that a representation vote be held pursuant to section 49(3) of the Act.

4. The Board has heard the first-hand evidence of the applicant who obtained and witnessed all of the signatures on the petition, except that her signature was witnessed by another petitioner. The Board is satisfied on her evidence that the preparation, circulation and filing of the petition with the Board is free of any management assistance, tacit or otherwise. The applicant told the Board that there were no meetings of management with employees and that the origin of the petition was not influenced or supported in any way by the employer.

5. The respondent, however, has asked the Board to disregard the petition and dismiss the application because the petition is not a voluntary expression of the true wishes of the employees. More particularly, the respondent alleges that:

- (a) the applicant had been the applicant in an earlier application which had been dismissed as untimely and that she had been active in the circulation of a petition in support of that application;
- (b) the earlier petition had emerged on the heels of a meeting of all employees called by the employer at which the hotel manager advised the employees to rid themselves of the respondent;

- (c) the employer, following the alleged meeting, permitted the applicant to openly circulate the first petition on the hotel premises during working hours; and
- (d) that by virtue of these activities, the applicant was identified as the agent of the employer for the purposes of terminating the respondent's bargaining rights, which identity persisted when she was again permitted to openly circulate the petition filed in support of the instant application.

Thus the respondent is asking the Board to find that the first petition was tainted by employer influence such that it was not a voluntary expression of the employees' wishes and by virtue of the applicant's identity with it and the instant petition, the latter petition was similarly tainted.

6. It is a matter of Board record that the first (i.e., untimely) application was filed October 16, 1978. The circumstances surrounding the preparation, circulation and filing of the petition in support of the application was very similar to the instant petition, except that the applicant was assisted by another employee (who resigned her employment early in January 1979) in circulation of the first petition. The Board is satisfied that there was neither tacit nor explicit assistance from the employer with the preparation, circulation or filing of the first petition.

7. Insofar as the origin of the 1978 petition is concerned, the respondent failed to establish that it followed upon a meeting of the employees called by the employer. Another employee called as a witness by the respondent, and the only witness other than the applicant to give evidence, placed that meeting in December 1978. Even when she referred to seeing the first petition, she did so in terms of that being about a week after the December meeting with management. These facts do not support the conclusion which the respondent is seeking to have the Board reach and there is no other evidence, direct or circumstantial on which the board might rely to do so.

8. The applicant's evidence is unequivocal and uncontradicted that both applications were made at the insistence of her fellow employees in the housekeeping department who made up most of the bargaining unit. In the first instance, the employees were dissatisfied with the lack of attention by the respondent. When the first application was dismissed November 9, 1978 the union made a further but unsuccessful attempt in the latter part of December to settle an agreement, following which there was a membership meeting. Since there was no further contact by the respondent with the members or the applicant, she was asked by the employees to file a new application, the one presently before the Board which was filed August 17, 1979. The only evidence, direct or circumstantial, of any intervening management activity is a memorandum dated January 9, 1979 from the hotel manager addressed to all employees. It urges them to turn out for a vote the respondent was expected to hold on the employer's last offer. It also comments on the content of the offer, including the following statement about union security:

"We also offer, as you have requested, an 'open shop' which means that you can, as a full-time employee elect whether you wish to be a union member and pay Union dues or whether you want to opt out of the



Union as a member and save your Union dues. Either way you receive the same rates of pay, same benefits and same protections.”.

9. Apart from its literal meaning, this statement may be viewed in several ways: as the employer sharing a mutual desire with the employees of getting rid of the respondent; or as merely reflecting a desire of the employees to do so; or, as the respondent is asking the Board to view it, an exhortation from the employer to the employees to rid themselves of the respondent. Were the Board to view it in the way the respondent asks (the Board makes no finding either way) as already stated, there is no evidence of the employer’s continuing opposition to the union being made known to the employees, between January 9th and the making of this application, in a way which might be seen as influencing the origin of the 1979 petition. The same may be said about management’s meeting with the employees in December 1978, were the Board to agree with the respondent’s allegation that management called the meeting for the purpose of urging the employees to rid themselves of the respondent (although the Board makes no finding either way). This case is quite different from the situations the Board is usually faced with where a petition in support of an application for termination of bargaining rights or in opposition to an application for certification is found to be tainted by employer influence. Usually the petition emerges closely upon some overt act of the employer or some other indication of active or tacit approval of the employer for the petition. In the instant case, even if the Board were to find that the December meeting with employees and the memorandum were exhortations from the employer for the employees to rid themselves of the union, we do not have anything approximating the usual situation. There is a seven month hiatus between the last employer activity and this application during which there is no evidence of the employer acting covertly or overtly to influence the employees against the respondent. Therefore, in all the circumstances of this application, the Board finds that the petition filed in support thereof is a voluntary expression of the employees’ true wishes.

10. Before concluding this matter, the Board wishes to point out that, even if the respondent had proven its allegation that the 1978 petition was tainted by employer support, or even if the Board which dismissed that application had done so because it found the petition to be tainted, all other facts being as we have found, the Board would still have found the 1979 petition to be a voluntary expression of the employees’ wishes. Such hypothetical circumstances would not be unlike those in which an application for termination is filed by the same person or persons who had supported a petition in opposition to certification of the trade union. In such cases the Board has found that, as it stated in *J. A. K. Electrical Contractors Limited*, [1977] OLRB Rep. May 275,

‘... an application filed under section 49 of the Act by persons who supported a petition in opposition to the certification of the union is not tainted and may be viewed as evidence of a continuing opposition.’.

In *J. A. K. Electrical* the Board found a petition filed in support of a section 49 application to be voluntary even though it was initiated by an employee who had supported a petition in opposition to certification of the union. The Board in that case, unlike the instant application, was dealing with a situation where the employees had been well and actively represented by the union and the Board rejected the union’s request to find the applicant’s evidence unbelievable because of the material benefits he had received from the union’s representation.

11. More recently in *Groves Park Lodge*, [1979] OLRB Rep. Sept. 871, the Board was dealing with a section 49 application which, like the instant one, followed one year after a previous, unsuccessful section 49 application. The Board expressed its concern in the following words about the carry-over effect on the second petition of the first one, which had been rejected by the Board as being tainted by the deep involvement of the employer with it:

“Regarding Viveen’s [the owner of the business] involvement in the first petition, the board does not draw the conclusion that simply because he was instrumental in the origination and circulation of the first petition he was similarly involved in the second. His participation in the first petition concerns the Board, however, because of the carry-over effect that may reasonably have existed in the minds of employees when the instant petition was circulated just one year later, particularly where it was circulated on the premises of the Lodge by the same person who helped circulate the previous petition. The potential for a carry-over effect in the minds of employees is further heightened by the small size of the Lodge and the daily presence of the Viveens who are admitted to be active administrators.”

The Board in *Groves* rejected the second petition as being “... tainted by the fear of managerial influences ...” and dismissed the application. While the hypothetical posed above in the instant case is similar, the facts surrounding the second petition are clearly distinguishable from *Groves*. In that case the Board was dealing with such circumstances as careless custody of the petition, a petitioner who was in constant job contact with the employer and whom the majority of the Board found to be perceived by the employees as having a close relationship with the employer and threats made to employees by that petitioner.

...

15. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER HARRY SIMON:**

1. I am not satisfied that the petition is a voluntary expression of the true wishes of the employees who had signed it in this case.

2. The petition is in my view tainted by the activities of the employer in connection with an earlier petition that was dismissed by the Board, for being untimely.

3. The respondent union charged that the General Manager of the Hotel held a meeting of employees in October 1978, on the premises during working hours and advised the employees to rid themselves of the union. This charge was substantiated by the evidence of Miss Sandra Harrison, a front desk clerk with one and a half years seniority who although she could not remember the exact date of the meeting did recite in detail what went on. She was precise in her evidence that the meeting was on a Thursday, that it was held in the Casino Building, that it lasted from 2:30 until approximately 4:00 p.m. That besides Mr. Stout the general manager, there were also in attendance Mr. Webber and Mr. Hawkins from management. Mr. Stout addressed the meeting at some length. He urged the employees to

get rid of the union and start their own organization, without outside help. He didn't think the employees needed a union shop and he promised them that the conditions would remain the same with the exception of two paid statutory holidays. He further promised that if business was to improve the employees would be given an increase in pay of 20¢ per hour.

4. It was following this meeting that the first petition for decertification was circulated by Mrs. Lockwood. Mrs. Lockwood in her evidence did not recollect attending the meeting, but she also admitted that its possible that the meeting was held and she was not there.

5. I am prepared to accept the evidence of Miss Harrison as being credible. In any event her evidence was not refuted by any other witness.

6. Further actions by the company following the meeting with the employees substantiate the unions charges that the employer was determined to get rid of the union as evidenced by the letter to the employees of January 9th, 1979 (Exhibit #1). This letter contained many veiled threats telling the employees "if you accept we carry on with business as usual, if you reject, then you are likely to be in a strike position."

7. In my view all of the employers actions and threats had their effect on the employees when they signed the second petition only eight months later, particularly when the petition was circulated by the same person.

8. The employer completely ignored the charges made by the union. They chose not to reply to the charges or deny them in front of the Board. The Board must therefore take a very serious view of this and draw its own conclusion.

9. For all of the above reasons I would dismiss the application for decertification of the union.

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**0681-79-R;0682-79-R** Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **J. H. Normick Inc. (Kirkland Lake Division)** and **Leo-Paul Turgeon**, Respondent.

**Certification – Related Employer – Employer and sub-contractor carrying on related activities – Employer exercising contractual and operational control – No common ownership or financial relationship – Board issuing section 1(4) declaration to further purposes of act and place collective bargaining structures on firm base**

**BEFORE:** Kevin M. Burkett, Vice-Chairman and Board Members H. J. Ade and O. Hodges.

**APPEARANCES:** *H. M. Pollit and Normon Rivard for the applicant; Murray Ellies and Leo-Paul Turgeon for the respondent.*



**DECISION OF THE BOARD; December 14, 1979**

1. The Board directs that the above applications be and the same are hereby consolidated.

2. This is an application under section 1(4) of the Act which has been filed in conjunction with an application for certification for a unit of employees working in Midlothian Township. The applications were filed on July 12, 1979. The persons for whom the union seeks bargaining rights perform tree cutting and skidding on timber rights owned by J. H. Normick Inc. in Midlothian Township. They are however, under contract to Leo-Paul Turgeon who in turn is under contract to Normick Inc. to perform the tree cutting and skidding within Normick's Midlothian Township limits. Section 1(4) of the Act provides:

"Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

Assuming the persons for whom the union seeks bargaining rights are employees within the meaning of the Act and not independent contractors (an issue yet to be addressed) the union has asked the Board to find under section 1(4) of the Act that Normick Inc. and Leo-Paul Turgeon constitute one employer for purposes of its application for certification.

3. J. H. Normick Inc. is in the wood processing business with branches in Cochrane and Kirkland Lake, Ontario and Lessard, Quebec. In addition to holding a number of timber cutting licences the company operates 6 sawmills and 2 plywood mills at which it processes raw wood into lumber and plywood for sale on the Canadian and American markets. The company commenced to have wood cut in its Midlothian Township rights during the first week of July, 1979. In the period prior to July, 1979 the company had been cutting trees in Blain Township with its own employees. Blain Township is 30 - 40 miles south-east of Midlothian Township. The skidder operators who worked for Normick in Blain Township owned their own skidder machines (valued from \$8,000 to \$50,000) were paid on the basis of the amount of wood cut and were responsible for obtaining their own cutters. The cutter trims and fells the tree while the skidder operator hauls the cut trees to the road. Although Mr. L. Bellanger, a skidder at the Blain site, testified that Normick had the authority to hire and fire cutters at the Blain site there is no evidence that this authority was ever exercised. The skidder operators were required to purchase their own fuel and to bear the cost of repairs to their skidder machines while working for Normick in Blain Township. On April 10, 1979 the Board certified the applicant as the bargaining agent for the approximately 24 skidder operators and cutters employed by Normick in the Township of Blain and immediately adjacent townships. The company, however, exhausted its Blain Township cutting rights on or about June 20, 1979 and decided to cut next in Midlothian Township. Midlothian Township is outside the geographic scope of the Board's certificate issued in respect of Blain and adjacent townships.

4. Mr. Leo-Paul Turgeon, who refers to himself as a forest contractor and testified that he had been a forest contractor since 1946, first contacted Normick in 1976 and inquired about the possibility of acquiring a wood cutting contract. Mr. Fred Burrows, the vice-president of Normick's woodlands division, referred Mr. Turgeon's name to Mr. Mike Roy, the woodlands manager of Normick's Kirkland Lake Division. Mr. Roy testified that a decision was made to subcontract the Midlothian cutting and accordingly, he met with Mr. Turgeon for the purpose of discussing a sub-contract arrangement between Normick Inc. and Turgeon in respect of the Midlothian cut. On June 14, 1979 Mr. Turgeon signed a 1 year contract to perform part of the Midlothian cut. Mr. Turgeon explained that while he was offered the total program he wanted just the cutting portion of it because of the increased risk of losing money if he were to undertake the hauling as well.

5. Mr. Roy testified that he asked Mr. Turgeon to give Normick's Blain Township employees first opportunity "to broker" for him. The evidence establishes that Mr. Turgeon agreed to this request and that Mr. Roy, the Normick manager, proceeded to draw up contracts for presentation to the Normick employees. Mr. Turgeon admitted in cross-examination that the payment schedules were attached to the broker sub-contracts when he first saw them and that he did not ask for any changes. When asked on whose instructions these rates had been set, he answered that he didn't know but stated that he "verified with others to see that the prices were right." The evidence establishes that shortly thereafter Normick arranged a cross-roads meeting between its skidder operators, who were in the process of being laid off, and Mr. Turgeon for the purposes of presenting the broker sub-contracts. In addition to Mr. Turgeon and Normick's skidder operators the meeting was attended by Messrs. Roy, Phillippon and Mathieu in their capacity as managers with Normick. Mr. Roy testified that Mr. Turgeon asked to have Normick supervisors hand out the contracts between himself and the skidders and that they therefore did so on his behalf. When asked who answered the questions raised by the skidder operators, Mr. Turgeon answered that he did not know. The 13 skidder operators who were present, the full complement, took the contracts away and by mid-week the following week all 13 had signed. Their skidder machines were transported by Normick, not by Turgeon, to the Midlothian site. Normick owns a flat bed truck for this purpose.

6. The agreement between Mr. Turgeon and J. H. Normick Inc. entered into on June 14, 1979 is for a term of 1 year subject to the proviso that it may be terminated by mutual consent of the parties at any time during its currency or by either one of the parties giving 30 days notice to the other in writing. Under the terms of the agreement Normick Inc. agrees to employ Mr. Turgeon to supply all labour working in and out of the Township of Midlothian, Montrose and Yarrow in the District of Temiskaming in the cutting and skidding of all logs on the company's limits and to pay Mr. Turgeon for tree length wood cut, delimbed, topped, skidded and piled at the roadside on a per piece basis as set out in Schedule "A" of the agreement. The agreement expressly provides that payment is to be "upon a count or measurement verified by the company ... with sufficient holdback to ensure payment of the contractor (Mr. Turgeon's) accounts to the satisfaction of the company" (J. H. Normick Inc.). Under the terms of the agreement Normick Inc. agrees to secure work permits from the Ministry of Natural Resources for Mr. Turgeon with respect to its cutting rights and more importantly, Normick Inc. agrees to supply to Mr. Turgeon "all equipment necessary to the contractor in the completion of his undertakings to the company." The contractor (Mr. Turgeon) agrees to pay for such repairs and maintenance as may be required for equipment used by him in the operation of the work. The agreement between Normick



Inc. and Mr. Turgeon deals with the relationship between Mr. Turgeon and his employees in so far as it provides:

“The Contractor agrees to properly payroll and make payments to all his employees, to registrar properly as employers with the Unemployment Insurance Commission and with the Ontario Workmen’s Compensation Board, the Industry and Labour Board of the Ontario Ministry of Labour with regard to the Employment Standards and the Department of National Revenue and to save harmless the Company from any infringement of these obligations and regulations concerning the Contractor and his employees.

The Contractor agrees to furnish periodically and before final settlement of their accounts, evidence that all liabilities to and in respect of employees and subcontractors of the Contractor have been liquidated and to save harmless the Company from any wages or other claims with respect to remuneration.”

The agreement between Mr. Turgeon and the individual skidder operators requires Mr. Turgeon to pay the skidder operators “upon a count or measurement verified” by J. H. Normick Inc., Kirkland Lake Division, as per Schedule “A” for price and Schedule “B” for standards and specifications. These are the schedules drawn up by Normick and accepted without alteration by Mr. Turgeon.

7. The skidders who had signed contracts with Mr. Turgeon and their cutters (the same ones as had worked the Blain rights) commenced to work the Midlothian rights on or about July 3, 1979; some 9 days before the union’s application in this matter. The evidence establishes that for at least the first two weeks Mr. George Phillippon, a Normick supervisor, supervised and directed the work of the skidders. Mr. Turgeon testified that his son was seriously ill at the time and as a result he could not be present at the site. From mid-July forward Mr. Turgeon has personally supervised the work of the skidders and cutters although Mr. Phillippon is still assigned to the site for the purpose of verifying the cut for purposes of payment by Normick to Mr. Turgeon and in turn to the skidders operators. Mr. Turgeon has hired 3 skidders as replacements for those who have departed since July, 1979. The skidders are paid by cheque from Turgeon. Normick provided bookkeeping services for Mr. Turgeon for the month of July, 1979. Mr. Turgeon explained that he had to learn Normick’s bookkeeping system and needed time to hire a clerk. He has since hired a clerk. While at least certain of the outward manifestations of the relationship between Normick – Turgeon and the individual skidder operators has changed since the union’s application for certification and section 1(4) applications, Normick was directly supervising and performing the bookkeeping function as of July 13, 1979; the date of the union’s applications. Mr. Turgeon lives and works out of a trailer owned by Normick Inc. and located on Normick property. Mr. Roy, Normick’s woodlands manager, testified that the trailer had been purchased by Normick for use as a mobile field office. A Normick safety sign appears on the trailer. Mr. Turgeon testified that when he could not find suitable accommodation in the Midlothian environs, he decided to rent the Normick trailer. He pays \$150 per month rent for the trailer accommodation.

8. Mr. Turgeon owns 2 bulldozers, a skidder, a tractor and a welding machine. He



bid on and was successful in obtaining a contract from the Quebec Government to clear a defined area of old stumps and plough the ground for replanting. He has one of his bulldozers and a driver assigned to that job which began on June 10, 1979. He rents his skidder to his son who works Normick's Midlothian site and by separate arrangement rents his other bulldozer to Normick. Other than the bulldozer operator working in Quebec Mr. Turgeon had no other employees working for him at the time he entered into the agreement with Normick Inc.

9. The applicant in this matter asks the Board to find on the evidence before it that Mr. Turgeon is no more than a supervisor for Normick and that the woodcutting operations on the timber limits of Normick in Midlothian Township are under the control and/or direction of Normick. Alternatively, if the Board finds that the position of Turgeon is higher than that of a supervisor or representative of Normick the applicant requests the Board declare under section 1(4) that Normick and Turgeon constitute a single employer under the Act.

10. The respondent Normick takes the position that on the evidence the criteria used in the leading *Walters Lithographing Company Limited* case [1971] OLRB Rep. July 406 have not been met as would require the Board to make the decision sought by the applicant. The respondent Normick argues that there is no common ownership or financial control and that the chance of profit and risk of loss is in the hands of Turgeon; that there has been no common management other than during the first few weeks of operation when Normick supervised the work and assisted with bookkeeping services; that there is no interrelationship of operation between Normick and Turgeon in that all of the cutting and skidding at the Midlothian site are carried on by Turgeon; that there has been no representation to the public as a single integrated enterprise; that there is no centralized control over labour relations in that Normick has no control over the hours, the discipline, the pay, the fringe benefits or working conditions of Mr. Turgeon or any of his sub-contractors. In addition counsel for Normick asks the Board to find on the evidence no common premises, no common equipment, no common sales staff, no interchange of employees other than the original sub-contractors, no common facilities, no common telephone, no common solicitors, no common directors or officers, no common labour relations, no similar work performed by employees of the different utilities, no common cheques and no common office. The respondent Normick argues in the alternative that even if we find on the evidence that Normick and Turgeon are one employer for purpose of the Act we should exercise our discretion under section 1(4) and dismiss the section 1(4) application on the grounds that it is open to the applicant to organize the skidder operators and cutters working in Midlothian. The defendant Normick denies that its decision to sub-contract the cutting and skidding in Midlothian Township was in any way connected with the unionization of its employees at Blain Township and reminded the Board that sub-contracting of this type of operation is common in the lumber business.

11. The respondent Turgeon takes the position that on the evidence the Board should find no common premises, equipment, sales staff, no interchanging of employees, no interrelationship of employees, equipment, telephone or supervision and further, that the Board should find no common ownership or financial control, no common management and no interrelationship of operations. The respondent Turgeon argues that the two were never represented to the public as a single integrated enterprise nor was there any centralized control of employees. The respondent Turgeon maintains that the evidence establishes that negotiations in respecting terms and conditions of employment were carried on between himself

and the sub-contractor, that he has authority to hire and fire and to control work methods. Turgeon argues that there were sound economic reasons for Normick Inc. to sub-contract for labour to Turgeon and in support referred to less administrative costs, no problem of absenteeism, ease of supervision and the fact that Normick no longer had to provide capital for unemployment insurance, income tax, vacation pay in workmen's compensation for its employees. In the face of the economic justification, and having regard to the findings which he asks be drawn from the evidence in respect of common control, the respondent Turgeon asks that the section 1(4) application be dismissed.

12. Under section 1(4) of the Act the Board is given the discretion to treat more than one entity as constituting one employer for purposes of the Act when it is satisfied that:

- (a) there is more than one corporation, firm, individual, association or syndicate involved;
- (b) these entities are under common control or direction, and
- (c) they are engaged in associated or related businesses or activities.

The underlying purpose of section 1(4) was described in the *Industrial Mine Installations Limited* case, [1972] OLRB Rep. Dec. 1029 wherein the Board stated:

“Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in term of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

Prior to the enactment of Section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.”

The Board went on in that case to caution that section 1(4) was not intended to be used by one trade union as a bar to another trade union's attempt to organize and so that there is an obligation to act promptly when confronted by a situation which might give rise to a section 1(4) declaration.

13. In this case the union has coupled its section 1(4) application with an application for certification. There has been no delay in the bringing of this section 1(4) application and it is not being used to bar another trade union from seeking to represent the persons who would be affected by a declaration that the two respondents are one employer for purposes of the Act. In these circumstances the Board must reject the submission of the respondent Normick that even if the conditions precedent to a section 1(4) declaration are established the Board should not make the declaration and direct the applicant to proceed by way of certification. If it is established on the evidence that Normick and Turgeon are carrying on associated or related activities or businesses under common control or direction the Board would not refuse to exercise its discretion in favour of making a declaration on the grounds argued by the respondent Normick.

14. The section extends to cover not only related businesses but related activities as well. The Board, therefore, is not restricted to considering corporate interrelationships but must also look to functional interdependence in determining if two or more entities are related within the meaning of the section. The second pre-condition to the issuance of a declaration is that the Board find that the related entities are "under common control or direction". In so far as "direction" refers to the impact of personal or corporate authority, the Board must also look to whatever contractual arrangements exist and to the economic reality in deciding if the related activities or businesses are under common "control". The Board now turns to a consideration of the nature and extent of the relationship between Turgeon and Normick Inc. within the context of the language used in section 1(4).

15. Accepting without finding that Mr. Turgeon is an independent entity and not simply a part of the Normick organization, then, clearly both he and Normick Inc. carry on associated or related activities. Normick Inc. is in the business of harvesting trees and processing lumber for sale on the Canadian and American markets. Normick Inc. has entered into a labour sub-contract with Turgeon for the cutting and skidding of trees on Normick's Midlothian rights for supply to Normick for processing at its sawmills and plywood mills. Normick Inc. holds the rights, decides the area to be cut, and builds the logging roads. Turgeon cuts and skids. Normick verifies and purchases the full cut and has the trees transported to its processing facilities. In these circumstances the Board is compelled to find that there exists a degree of integration between the activities of Normick Inc. and the activities of Turgeon as to require the Board to find that they are "related activities" within the meaning of section 1(4) of the Act. Indeed, the degree of integration is such that there is no need for Turgeon to hold himself out to the public in the usual manner. Turgeon works solely for Normick Inc.

16. The Board's finding in this regard is to be contrasted with that made in *Diversey (Canada) Limited and Diversey Environmental Products Limited* [1978] OLRB Rep. Sept. 814. In that case, although a corporate relationship existed, the Board found that the day to day management was separate and that the two companies were "not integrated in a functional sense" and that they were not, therefore, associated or related within the meaning of section 1(4). In this case, however, Normick can hardly be heard to say that the activity carried on for it by Turgeon, which had been performed by itself in Blain Township and elsewhere and which is integral to its overall operation, is not a related activity with respect to Normick's other business activities.

17. There can be no dispute that when Normick harvested in Blain Township it con-



trolled the cutting and skidding operation. In Blain Township Normick hired the skidder operators and paid them on a piece work basis tied to the size of the trees cut and skidded. Normick verified the cut and paid accordingly. The evidence establishes that the skidder operators owned their own machines, paid for their own gas and repairs and most importantly, effectively hired their own cutters at Blain. While Normick set certain hours of work at Blain the Board, having regard to the size of the skidders' investment in equipment (\$8,000 to \$50,000 each) and to the fact that payment was on a piece work basis, does not consider the setting of hours at Blain as a persuasive indicia of control. There is no evidence that Normick Inc. ever had to force the skidder operators to work the fixed hours at Blain. In the Board's view the essential elements of Normick's control at Blain centered in the method of payment and Normick's authority to verify the cut and ultimately in its authority to terminate the services of persons with a sizeable investment in equipment.

18. Using the Blain operation as a point of reference the Board must decide if the related activities of Normick Inc. and Turgeon at Midlothian are under common control. In this regard we start with the factual finding that Normick Inc. and Turgeon are not equals in any sense of the word. Normick Inc. is a large corporation holding extensive timber cutting rights in Northern Ontario and Quebec and operating a number of sawmills and plywood mills. Mr. Turgeon, on the other hand, owns a few pieces of machinery and possesses a knowledge of woodcutting operations born of more than 30 years' experience. At the time of entering into a contractual relationship with Normick, Turgeon may have had only one employee working for him and other than for the small Quebec Government job he was not carrying on any other business activities. Although entering into a labour sub-contract Mr. Turgeon had at most one employee and no brokers under contract. The economic and organizational imbalance between the two respondents is borne out by Normick's role in the period leading up to the application in this matter. It was Normick who decided not to employ its own operators at Midlothian, who suggested these men work in Midlothian for Turgeon, who drew up the broker sub-contracts (there is no evidence Turgeon initiated the decision to utilize subcontractors rather than employees), who presented these sub-contracts to its skidder operators and it was Normick who transported their machines from Blain to Midlothian. Mr. Turgeon, a labour sub-contractor without a labour force, was provided with a ready-made labour force by Normick. In addition, Normick provided bookkeeping services for Turgeon during the first month of operation (through the date of application in this matter) because Mr. Turgeon did not have a bookkeeper. Normick also provided direct supervision of the work force during the early part of July (through the date of application in this matter) when Mr. Turgeon was absent and could not provide his own replacement. The economic and organization imbalance between the two respondents, as underscored by Normick's role, must be considered by the Board in deciding whether Normick continued to exercise control of the cutting and skidding activity at Midlothian.

19. The evidence establishes that Normick Inc. drew up the contract between itself and Turgeon in respect of the Midlothian cut and more importantly, Normick drew up the contracts subsequently entered into between Turgeon and the individual skidder operators. The rate schedule appearing in the contracts between Turgeon and the individual skidder operators was set down by Normick without instruction from or prior consultation with Turgeon and accepted by him without alteration. Having regard to the method of payment to Turgeon as set out in schedule "A" to the contract between Normick Inc. and Mr. Turgeon, the rate schedule in the broker-sub-contracts as set down by Normick without prior consultation determines Mr. Turgeon's profit margin. Normick maintained the same method of

verification and payment in Midlothian as had existed in Blain Township. The contract between Normick Inc. and Turgeon provides that Mr. Turgeon will be paid upon a count or measurement verified by Normick Inc. ("with sufficient holdback to ensure payment of the contractor's accounts to the satisfaction of the company"). The contract between Normick Inc. and Turgeon regulates the relationship between Mr. Turgeon and his sub-contractors to the extent detailed in paragraph 6 herein and most importantly for our purposes, allows either party to terminate the contract on thirty days notice to the other. Having regard to the economic and organization imbalance between Normick Inc. and Mr. Turgeon, the power of Normick to terminate on short notice is a compelling indicia of economic control.

20. The Board is satisfied on the evidence that Normick Inc. effectively arranged to have its employees transferred to Midlothian and thereby maintained in place a work force which it had hired. Other than for three replacements hired by Mr. Turgeon that same work force remains in place. In view of the manner in which Normick's work force was transferred and the nature of the relationship between Normick Inc. and Mr. Turgeon, we do not place Mr. Turgeon's ability to hire replacements on any higher plane than that of a Normick manager. Indeed, it was Normick who set the payment schedule to the skidder operators without prior consultation with Mr. Turgeon; a payment schedule which was accepted by Turgeon without alteration. The arrangement between Normick Inc. and Mr. Turgeon, who are not equals in any sense, allows Normick to maintain the essential elements of control of the cutting activity. The trees are cut to Normick's specifications and payment is made both to Mr. Turgeon and through Mr. Turgeon to the skidder operators on the basis of verification by Normick that the trees are to its specifications. Normick, who owns the cutting rights and the mills at which the trees are processed, had the right on 30 days' notice to terminate the contract of Mr. Turgeon who, other than for the small job in Quebec, is economically dependent upon Normick. While Normick has relinquished the hiring of replacement operators, direct supervision and the setting of hours, in the Board's view it has retained the essential elements of control which it exercised at Blain Township. The Board is satisfied that Normick Inc., through its authority to allow cutting on its rights, to verify the cut and to terminate the labour sub-contract on short notice, maintains de facto operational and economic control over the cutting activity in Midlothian Township.

21. Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control of related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See *Zaph Cosntruction Ltd.* [1976] OLRB Rep. Nov. 741 and *Ellwall and Sons Construction Limited* [1978] OLRB Rep. June 535.) In



view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of *The Labour Relations Act*.

22. Assuming without finding that Mr. Turgeon is not simply a part of the Normick Inc. organization, the Board is satisfied on the evidence that Mr. Turgeon and Normick Inc. are engaged in related activities and that these activities are under the effective control of Normick Inc. The conditions precedent to a declaration under section 1(4) of the Act have been satisfied. In this case the relationship between Turgeon and Normick Inc. is such that if the Board does not exercise its discretion in favour of issuing a section 1(4) declaration the employer party to the employment relationship (if one exists) and to the collective bargaining structure which will result if the union is certified, will be the employer in name only. If the Board does not issue a declaration, the entity possessing both economic and de facto operational control would not have a legal relationship within the ambit of *The Labour Relations Act* with those employees who are the subject of its control. The potential labour relations weakness of this result is self-evident. Having regard to all of the foregoing the Board is of the view that it should make a section 1(4) declaration in this case in order to reflect in law the economic and organization reality and thereby put the labour relations of these related activities on a sound footing. Having regard to all of the foregoing the Board hereby declares under section 1(4) of the Act that J. H. Normick Inc. (Kirkland Lake Division) and Mr. Leo-Paul Turgeon are one employer for purposes of the Act. Hence, in the processing of the applicant's application for certification, Normick and Turgeon are to be treated as one employer.

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**1340-76-JD** Labourers' International Union of North America, Local 183, Complainant, v. International Brotherhood of Electrical Workers, Local 353, **K-Line Maintenance & Construction Limited**, Utility Contractors' Association of Ontario, Electrical Contractors' Association of Ontario, and The Public Utilities Commission for the Borough of Scarborough, Respondents.

**Construction Industry – Jurisdictional Dispute – Complaint relating to work associated with laying underground cable – Relevant criteria reviewed**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** J. Sack and others for the complainant; L. C. Arnold and Morley Hughes for International Brotherhood of Electrical Workers, Local 353; M. G. Mitchnick and G. Kellett for K-Line Maintenance & Construction Limited; John C. Murray, J. Baker, and others for the Utility Contractors' Association of Ontario; J. P. Wilson for the Electrical Contractors' Association of Ontario; no one appearing for The Public Utilities Commission for the Borough of Scarborough.



**DECISION OF THE BOARD; December 13, 1979**

1. The complainant has requested that the Board issue a direction under section 81 of *The Labour Relations Act* with respect to the assignment of work set forth in paragraph three.
2. The Board notes that the parties which appeared before the Board consented to the substitution of Board Member O. Hodges in the place and stead of Board Member E. Boyer.
3. The work which is in dispute and which is the subject matter of this complaint is:  
  
 "Work associated with the laying of underground cable along Kennedy Road and Sheppard Avenue in the Borough of Scarborough which includes such items as trenching, installation of ducts, transformers, switching cubicles, pedestals, pouring and working of concrete, pulling wire through ducts, shoring, coupling or joining of ducts, covering ducts with planks, backfilling, construction of manholes, sand bedding, augering, direct burial of cable, assisting in the installation of luminaires and poles, but not including such items as connection of luminaires, splicing of cable and termination of cables, connections to transformers, pedestals and switching cubicles, connection of overhead to underground cables, testing of electrical installations."
4. At the commencement of the hearing of this complaint, the complainant stated that the project had been completed and asked that any direction should be made with respect to the Board's geographic area #8 and should not be limited to the project. The Utility Contractors' Association of Ontario ("UCAO") joined in this request.
5. The evidence of the first witness, Leonard Terry, indicated that members of the International Union of Operating Engineers, Local 793 ("Local 793") performed a small portion of the work in dispute as part of an integrated crew with members of the complainant. The International Brotherhood of Electrical Workers, Local 353 ("Local 353") made a motion that as a practical matter Local 793 ought to be given notice of this complaint because members of Local 793 might lose some work as a result of any direction which the Board might make under section 81. In this motion Local 353 was supported by the Electrical Contractors' Association of Ontario ("ECAO") and K-Line Maintenance & Construction Limited ("K-Line"). This motion was opposed by the complainant and the UCAO. A majority of the Board, with Board Member E. Boyer dissenting, denied the motion. In denying the motion, the majority of the Board ruled that the jurisdictional dispute which was apprehended by Local 353 had not materialized and might never materialize. The majority ruled that it was not a question or an issue of a denial of natural justice because Local 793 had not made a claim to the work in dispute in this complaint. The majority added that in the event that Local 793 subsequently made a claim for any portion of the work in dispute, the Board would entertain such a claim at that time.
6. The Board heard evidence from thirty-one witnesses with respect to the nature of the work affected by this complaint, the skills and training necessary to perform such work, considerations of safety, area practice, economy and efficiency, collective bargaining rela-

tionships and the history of such relationships, and the practice of K-Line and its preference in assigning the work in dispute.

7. This complaint with respect to the assignment of work involves the complainant and Local 353. Throughout this proceeding the complainant and UCAO were allied in interest. On the other hand, Local 353, K-Line and ECAO were allied in interest. The alliances which existed during this proceeding no doubt reflect the bargaining relationships which exist between the Ontario Provincial District Council of the Labourers' International Union of North America and the UCAO and between Local 353 and members of ECAO. The direction of the Board whether in favour of the complainant or Local 353 may well affect the amount of the work in dispute which is available to members of the UCAO and to members of ECAO and electrical contractors generally. This state of affairs is a reflection of the fact that members of the UCAO usually have a collective bargaining relationship with the complainant and not with Local 353, while members of the ECAO usually have a collective bargaining relationship with Local 353 and not the complainant. Very few employers who perform the work in dispute have collective bargaining relationships with both the complainant and Local 353. Where collective bargaining relationships exist with both trade unions it is usually accomplished either through different divisions of the same company or different companies which belong to a group of related companies.

8. There is no doubt that the complainant's request for a direction is founded upon the circumstances set forth in section 81. However, this complaint is, in many ways, not typical of requests for a direction. In addition to the dispute between the complainant and Local 353, there is the added dimension of competition between two different parts of the construction industry. These two different parts are represented in this proceeding by the UCAO and the ECAO.

9. This competition results from the intersection of these two different parts of the construction industry at points where the work in dispute is performed. There are substantial areas of work where these two different parts are not in competition. In order to consider how this competition began it is helpful to understand the paths by which these two different parts converged on the work which is in dispute. K-Line and similar employers who are represented by ECAO essentially had their origin as line or electrical contractors which were engaged in the installation of overhead work with respect to electrical transmission, street lighting and communications for highways, streets, parking lots, and subdivisions. Such overhead work was performed by linemen, linemen's apprentices, electricians, electricians' apprentices, groundmen, drivers and cable splicers represented by various locals of the International Brotherhood of Electrical Workers. The utility contractors as represented in this proceeding by UCAO originated, for the most part, as civil contractors and performed such jobs as sewer and watermain work, pipelines and gas lines. Until the early nineteen sixties only a small amount of cable was buried. Most cable was installed as overhead lines. Commencing in the early nineteen sixties many municipalities began to require telephone, power and cable television cables to be buried. This work was usually performed by construction labourers. The utility or civil contractors had the equipment and the experience in excavating trenches and placing lines and ducts in the trenches. The line or electrical contractors had the experience and personnel necessary to install cables. The installation of cable in ducts and in trenches represents the intersection of these different parts of the construction industry.



10. The work which forms the subject matter of this complaint was performed by K-Line using a crew which was arguably represented by Local 353. Initially Local 183 contemplated organizing the employees of K-Line on the job site at Kennedy Road and Sheppard Avenue. However, Local 183 was unsuccessful and this was never pursued and the complainant decided to file this complaint with the Board. The work at Kennedy Road and Sheppard Avenue involved the installation of underground electrical transmission cables and the installation of street lighting for The Public Utilities Commission for the Borough of Scarborough (the "Commission"). However, the complainant claims only those portions of this work which are referred to in paragraph three. The work which forms the subject matter in dispute was performed by employees who used shovels, mechanical trenching equipment and a front-end loader.

11. In the *Anchor Shoring Limited* case, [1974] OLRB Rep. August 528, the Board referred to various criteria which are considered in making a direction under section 81(1) of the Act. These criteria are (a) collective bargaining relationships, (b) skill and training, (c) considerations of economy and efficiency, (d) the employer's practice and (e) the area practice. These criteria have subsequently been followed by the Board. See, for example, the *Deep Foundations Limited* case, [1975] OLRB Rep. March 175; and the *Urban Consolidated Construction Corporation Ltd.* case, [1977] OLRB Rep. February 41.

12. The Board now considers the first criterion of collective bargaining relationships. There is no dispute that the complainant does not have a collective agreement with K-Line. Indeed, there is no evidence that the complainant ever had a collective agreement with K-Line. On the other hand, Local 353 has had a collective agreement with K-Line from 1967 until 1973. Since 1975 K-Line, together with other line or electrical contractors, has endeavoured to bargain for a provincial collective agreement. In the meantime K-Line, together with other line or electrical contractors, have agreed to extend the collective agreement with periodic increases in the wage rates. The collective agreement which expired in 1973 provided for the coverage of journeymen linemen, apprentice linemen, cable splicers, apprentice cable splicers, groundman drivers and groundman operators and provided for rates for these classifications. This criterion favours the claim of Local 353 to the work in dispute.

13. The criterion of skill and training involves a consideration of the work in dispute and the skill and training which are necessary to perform such work. There was evidence before the Board that it required skill to pull cable without direct supervision and that it is necessary for an employee to know the specifications and tolerances of about twelve different types of cables. It was even contended that there were examples of damage to cable at the hands of members of the complainant. In our view, however, this contention was not established by the evidence before the Board. It was argued that it was essential that apprentice linemen and apprentice cable splicers should necessarily be exposed to the work in dispute as a part of their training. It is no doubt desirable that apprentice linemen and apprentice cable splicers become familiar with the work in dispute. However, such exposure is readily obtained on the job and, in our view, there would be no real need to regularly or continually perform the work in dispute in order to obtain such exposure. It is quite clear that linemen and splicers perform very little, if any, of the work in dispute. The work in dispute requires skill and training. The skill is of a non-technical nature and the training is easily acquired on the job. Persons represented by both the complainant and Local 353 possess the skill to perform the work in dispute from the training and experience they receive on the job. This criterion equally favours the assignment of the work in dispute to persons represented by either the complainant or Local 353.



14. The third criterion is considerations of economy and efficiency. The evidence on this point does not clearly point in any direction. The first witness who testified before the Board was Leonard Terry. Mr. Terry is the president of both the UCAO and Par-Tex Engineering Contracting Co. Ltd. ("Part-Tex"). He testified that K-Line is a competitor of Par-Tex with respect to the work in dispute. In cross-examination he agreed that K-Line has an advantage from a competitive stand-point over Part-Tex in not dealing with two craft trade unions. Mr. Terry also agreed that K-Line was more flexible than Part-Tex because K-Line performed with its own employees not only the work in dispute but also related work. The witness also agreed that it was cheaper to use your own forces for everything and not to subcontract and added that subcontractors may incorrectly estimate a job. On the other hand, Mr. Terry considered labourers were faster and more economical than persons represented by Local 353. James Lund, the general manager of G. M. Gest Limited, gave evidence that on some work functions labourers have a productivity of two to one as compared to electricians. He specifically referred to the direct laying of cable. Mr. Lund testified that in form-setting and concrete finishing the margin of productivity was greater at about eight to one. He stated that labourers would lay two feet of duct for every foot of duct laid by persons represented by the International Brotherhood of Electrical Workers. Mr. Lund informed the Board that with respect to hand trenching the rate of productivity was ten to one in favour of labourers.

15. With such decisive margins of productivity it is surprising that employers such as K-Line are able to successfully bid on any portion of the work in dispute. Nevertheless, K-Line is able to successfully bid on work which includes the work in dispute. Glen Kellett, the president of K-Line, testified that in the operation of K-Line he found it more economical to perform the work in dispute with employees represented by Local 353. Mr. Kellett's evidence with respect to the economy and efficiency of operating K-Line with employees represented by Local 353 rather than employees represented by the complainant and Local 353 was not seriously challenged. Notwithstanding the evidence with respect to productivity by Mr. Lund it appears to the Board that K-Line in terms of its overall operation finds it more economical and efficient to schedule its work and to perform the work in dispute with employees represented by Local 353. Considerations of economy and efficiency are not to be considered in the abstract. Such a criterion is to be considered in relation to the operations of K-Line. It should not be forgotten that the complainant seeks a direction not in the abstract but with reference to the business operated by K-Line. In considering the operation of K-Line's business it is unrealistic to isolate merely the work in dispute as a part separate and apart from its overall undertaking. The Board finds that it is more economical and efficient for K-Line to perform the work in dispute with persons represented by Local 353. This criterion favours the claim of Local 353 to the work in dispute.

16. The fourth criterion to be considered is the employer's practice. K-Line entered into its first collective agreement with Local 353 in 1967. It has never used members of the complainant to perform the work in dispute. K-Line has performed the work in dispute with persons who are covered by the collective agreements it has had with Local 353. Mr. Kellett emphatically declared K-Line's preference for performing the work in dispute with employees for whom Local 353 has bargaining rights. This criterion favours the claim for Local 353 to the work in dispute.

17. The last criterion of area practice is by far the most difficult criterion to apply to the facts of this complaint. The evidence on area practice was by far the biggest single issue

before the Board. The complainant contended that the appropriate area practice to be considered by the Board is in relation to underground work performed by utility or line contractors on public property or public rights-of-way in the Board's geographic area #8. The complainant submitted that the practice of owners or utilities performing the work in dispute for themselves on their own property was not relevant. In support of this submission the complainant pointed out that the internal jurisdiction of Locals 1788, 353 and 636 of the International Brotherhood of Electrical Workers supported this distinction. The complainant pointed out that the jurisdictional boundary lines between Local 1788 and Local 353 are based upon the distinction that Local 1788 represents employees of Ontario Hydro who perform work in Ontario Hydro on its own property while Local 353 represents employees of contractors performing work for others. This was contrasted with the fact that Local 636 represents employees who work for their own employer's system.

18. The complainant also contended that further jurisdictional differences existed between work done outside the property line and work done within the property line. The complainant pointed out that the International Brotherhood of Electrical Workers also recognized this difference in jurisdiction by virtue of a collective agreement between the Electrical Contractors Association of Toronto and Local 353 which covers electricians and electricians' apprentices. This was compared to the situation where a separate line agreement has been under negotiation with line contractors since 1973.

19. The evidence before the Board establishes that the International Brotherhood of Electrical Workers recognizes that there is a line of demarcation between work performed outside property lines and work performed inside property lines. The work in dispute was performed outside property lines and in the *Clement & Bellmore Construction Limited* case, [1967] OLRB Rep. August 464, the Board recognized such a distinction.

20. Local 353 adopted the position that the relevant area practice should include work performed both outside and inside property lines and should also include work performed by utilities on their own property.

21. The appropriate area practice for the Board to consider is the work performed outside property lines and the work performed by utilities on their own properties. The work performed inside property lines is not considered by the Board in this complaint. The Board makes this distinction on the basis that work performed inside property lines has been treated differently by the International Brotherhood of Electrical Workers, K-Line and other electrical contractors who are members of the Electrical Contractors Association of Toronto. In addition, it should not be forgotten that the work in dispute involves work performed on public property in conjunction with street lighting which is located on public property.

22. While the evidence with respect to area practice was overwhelming it was seldom precise. Reams of tables and statistics were introduced in evidence followed by extremely lengthy cross-examination. For the most part the tables and statistics were not prepared by the witnesses but rather were prepared under their supervision. The parties did not object to this manner of presentation and neither does the Board. However, it was apparent that for the most part the witnesses did not know sufficient details about the projects they were discussing so as to enable the Board to make anything more than approximate comparisons between the evidence of the witnesses. For example, while approximate trench footage, cable



footage, conduit footage and dollar value were cited in the tables and statistics, the witnesses were frequently unable to testify whether or not some of the work had been subcontracted. Where some of the work had been subcontracted the witnesses were almost invariably unable to state the value of the subcontract. In other instances the value of a particular contract included work which went beyond the work in dispute and in some cases even included the value of material and equipment which the contractors had incorporated into the project. Some of the projects were not within the Board's geographic area #8, which the parties agreed was an appropriate geographic area for consideration by the Board. The tables and statistics covered varying period of time and some of the work was performed by mixed crews. Not all of the employers who were referred to performed all of the work in dispute and the projects varied widely in the content of the work performed.

23. It is therefore not possible for the Board to assess the evidence with respect to area practice on a precise basis. However, the Board finds on the balance of probabilities that a clear majority of the work in dispute as determined to be within the appropriate area practice is performed by members of the complainant. This criterion favours the claim of Local 183 to the work in dispute.

24. The Board also heard evidence with respect to considerations of safety. Some of the evidence referred to what might happen to members of Local 183 who happened to be working near energized cables. In fact, apprehension as to what might happen in such circumstances has never been realized. The evidence before the Board is most gratifying. All of the parties which appeared at the hearing have a commendable awareness of safety and their safety records are uniformly excellent. There is no basis with respect to safety for favouring the claim of either the complainant or Local 353.

25. The Board heard evidence with respect to the availability and non-availability of a pool of skilled and experienced workers to perform the work in dispute. The Board also heard evidence of the practice of K-Line and Local 353 with respect to the remuneration of the employees who perform some of the work in dispute and the quality of the representation of such employees for whom Local 353 holds bargaining rights. Counsel for the complainant penetrated to the heart of the concern of the complainant and the UCAO when in referring to K-Line's practice he stated, "... what we have is cheap non-union labour being protected by the cloak of the IBEW and that's what Mr. Terry and we find to be illegitimate competition."

26. There is no doubt that the complainant is capable of supplying employees from its pool of experienced members to perform the work in dispute. The complainant is able to provide many times the number of employees that Local 353 is able to provide to perform the work. In our view, however, the weight of numbers is not a factor which should affect an assignment of work under section 81. The availability of experienced employees to perform the work in dispute, in our view, will eventually become a factor in the market place and it is in the competition of the market place that the supply of experienced employees may determine whether the members of the UCAO or members of ECAO will secure work on any given project.

27. There is no doubt that Local 353's record in representing groundmen, groundmen drivers and groundmen operators employed by K-Line is most unimpressive. K-Line performs the work in dispute by using employees in these classifications, employees from its



yard who are not represented by any trade union and to a limited degree linemen and cable splicers and their apprentices. Local 353 is not always able to supply groundmen, groundmen drivers and groundmen operators to K-Line. In these circumstances K-Line hires from sources other than Local 353's hiring hall. Mr. Kellett testified that when he hires from other sources he tries to ascertain if they will be suitable for regular employment with K-Line. Initially, at least, K-Line does not pay such employees according to the rates specified under the collective agreement. They are paid less than the rates specified under the collective agreement which is binding on K-Line and they usually do not become members of Local 353 before they cease being employed by K-Line. There is a high turnover of groundmen, groundmen drivers and groundmen operators. After a few weeks such employees usually quit their employment or are terminated by K-Line as not being suitable for regular employment. It is at this point that the complainant criticizes the conduct of Local 353 in not representing what it regards as casual employees. The Board accepts Mr. Kellett's evidence that it is difficult to find and train suitable groundmen, groundmen drivers and groundmen operators. On the balance of the evidence the Board is not prepared to find that there is a collusive arrangement between K-Line and Local 353 whereby the linemen and cable splicers and their apprentices are afforded employment and representation under a collective agreement in return for competitive advantages in the form of groundmen, groundmen drivers and groundmen operators being employed at rates below those specified under the collective agreement. Such employees have in the past typically had only a brief association with K-Line and a practice appears to have developed whereby neither K-Line or Local 353 follows the usual procedure of referring these employees to Local 353 for membership.

28. The Board has previously referred to the interest of the complainant in organizing some of the employees of K-Line who perform the work in dispute. There is clearly as much a representational aspect to the facts of this proceeding as there is an aspect concerning the assignment of work. The representational aspect may come to the fore on subsequent occasions and the provisions of section 60 of the Act may also become a matter for future consideration. None of these considerations, however, obscures the fact that at the time of the filing of this complaint Local 353 was the bargaining agent for groundmen, groundmen drivers and groundmen operators and that Local 353 therefore was entitled to represent some of the employees who performed the work in dispute.

29. Of the five criteria referred to by the Board in paragraph eleven, only one criterion, area practice, favours the claim of the complainant to perform the work in dispute. Considerations of economy and efficiency and K-Line's practice favour the claim of Local 353 to perform the work in dispute. The criterion of skill and training equally favours the claims of both the complainant and Local 353. The criterion of collective bargaining clearly does not favour the claim of the complainant but does to a certain extent favour the claim of Local 353. The weight of the criteria is clearly in favour of the claim of Local 353 to the work in dispute. The Board therefore finds, on the evidence and argument before it, that Local 353 has the superior claim to the work in dispute.

30. The complainant and the UCAO requested that any direction be made with respect to the Board's geographic area #8. In view of the fact that this is the first occasion on which the Board has dealt with the work in dispute, the Board is not prepared to expand the scope of its direction to the Board's geographic area #8.

31. Having regard to the foregoing and pursuant to the provisions of section 81(1) of The Labour Relations Act, the Board makes the following direction:

K-Line Maintenance & Construction Limited shall continue to assign work associated with the laying of underground cable along Kennedy Road and Sheppard Avenue in the Borough of Scarborough which includes such items as trenching, installation of ducts, transformers, switching cubicles, pedestals, pouring and working concrete, pulling wire through ducts, shoring, coupling or joining of ducts, covering ducts with planks, back-filling, construction of manholes, sand bedding, augering, direct burial of cable, assisting in the installation of luminaires and poles, to employees who are represented by the International Brotherhood of Electrical Workers, Local 353.

**CONCURRING OPINION OF BOARD MEMBER O. HODGES:**

1. Paragraph 10 and paragraph 28 of the unanimous decision of the Board indicates that Local 183 filed this section 81 complaint claiming work after the employees doing that work did not respond to the Local 183's organizing efforts. The notes of my predecessor on this panel of the Board with regard to the testimony of L. Castaldo, the business representative assigned by Local 183 to organize these employees of K-Line, leaves no doubt that the employees concerned in this case did not join Local 183. The notes of this testimony also disclose that employees of K-Line at another job site were also approached with the same result.

2. It is my understanding that when a claim by a trade union for certain work to which their members are entitled is established to the satisfaction of this Board, the Board will require the employer concerned to engage members of the complainant union to perform the work in dispute. It would appear that the workers required would then be employed through the hiring hall procedures of the successful trade union.

3. Obviously Local 183 was entitled to organize the yard employees of K-Line doing the claimed work, since these employees were not represented by any union, and to then apply for certification or to seek voluntary recognition anytime.

4. Local 183 has misconstrued the purpose of section 81 in this instance.

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**0523-79-U; 0524-79-R** Canadian Union of Public Employees, Applicant, v. Metropolitan Parking Inc., Respondent.

**Sale of a Business – Change of subcontractor – Same work performed at same premises with many of same employees – No sale or transfer of business – Definition of business considered – Criteria determining elements of sale of business reviewed**

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members J.D. Bell and H. Simon

**APPEARANCES:** *Martin Levinson and Paul Pelletier for the applicant; Robin B. Cumine, Q.C. and Stan David for the respondent.*

**DECISION OF THE BOARD; December 18, 1979****I**

1. This is an application under section 79 of *The Labour Relations Act* which was heard together with an application under section 55 of the Act. The applicant union contends that the respondent, Metropolitan Parking Inc., (hereinafter referred to as ("Metropolitan")) is the successor of Toronto Auto Parks (Airport) Limited (hereinafter "TAP"). The union further contends that Metropolitan has refused to hire the grievors because of their trade union activity. Both TAP and Metropolitan have been engaged in the management and operation of the public parking facilities at Toronto International Airport.

2. In March of 1978 the union applied for certification as the bargaining agent for the employees of TAP and, in support of its application, the union submitted documentary evidence of membership on behalf of some seventy-five per cent of the employees. On July 31, 1978 the Board issued an interim certificate. TAP applied for judicial review and in November, 1978 the Divisional Court dismissed the application. The union and TAP met and bargained with a view to concluding a collective agreement, the conciliation process was completed, but no collective agreement was concluded.

3. By letter dated December 6, 1978 TAP gave all of its employees formal notice of termination of their employment. TAP advised them that the current contract for managing the parking facility would expire on January 31, 1979, that it intended to bid on the new contract, and that if it was successful it would retain as many of the existing employees as possible. As it turned out, TAP was not the successful bidder. The successful bidder was Metropolitan. There is no corporate relationship between TAP and Metropolitan, nor was there any business relationship or contact prior to the acceptance of Metropolitan's successful tender.

4. Both TAP and, subsequently, Metropolitan, carried on business under a complex contractual arrangement with the Federal Government. The Federal Government "owns" the parking lot and provides virtually all of the assets required to run it. These assets include: the typewriters, calculators, office furniture, collection booths and heaters, communications and ticket handling equipment. The Crown is responsible for the supply of electricity, snow removal and repair of the parking facilities and lighting fixtures. The Crown determines the hours that the parking lot will be open. The Crown sets the parking charges, the mode of payment and method of accounting for monies collected from the public. All such monies are remitted to the Crown. The operator derives no benefit from the sums collected. The operator's "customer" is the Federal Government, not the patrons of the parking lot. The Crown also reserves the right to direct the employer to increase or decrease the number of persons employed, or to conduct training programs utilizing training packages supplied by the Airport General Manager. The contract further provides:

"(f) The Company shall employ a Manager and an Assistant Manager experienced in the operation and management of parking facilities and who shall be located at the said airport on a full time basis; the said Manager and Assistant Manager shall be vested with full authority as required for the operation of the said public car parking facilities to the satisfaction of the Airport General Manager.



- (g) The Company shall employ a full time experienced Supervisor at each of Her Majesty's Terminal One and Terminal Two public car parking facilities on a twenty-four hour per day basis and, in addition, the Company shall employ one Senior Parking Attendant at each Terminal between the hours of 0800 and 2400 daily."

5. The operator itself supplies very little. It must maintain the cash registers and adding machines; and provides its own parking tickets, printed material (available to the public), employee uniforms, insurance in the sum of \$1,000,000.00 and a performance bond of \$500,000.00. In addition the operator must keep the premises clean. General control and supervision of the facility remains subject to the authority of the Airport General Manager. The agreement provides:

"(24) The said service to be performed by the Company under the provisions of this agreement shall, in every respect, be under and subject to the control and supervision of the Airport General Manager, and all orders, directions and instructions at any time given with respect thereto, or concerning the conduct thereof, shall by the Company promptly and efficiently be obeyed, performed and complied with, to the satisfaction of the Airport General Manager and in conformity with this Agreement."

6. The initial selection of employees remains the prerogative of the operator, but such employees must be paid in accordance with certain "fair wage" requirements. These involve a form of guaranteed minimum wage (well above the statutory minimum wage in either the *Canada Labour Code* or *The Ontario Employment Standards Act*), which may be revised from time to time. Essentially, the business of both TAP and Metropolitan involved the supply of managerial and employee skills to the Federal Government; and virtually every aspect of the business – including important aspects of the employer-employee relationship – is regulated by the management contract or is subject to direct control by the Crown. The operator brings its own experience and system of management, but its organization must be adapted to the government's needs and requirements.

7. The management contract is let for a three-year term by public tender. TAP's contract expired January 31st, 1979. In December, 1978 the Ministry of Transport invited tenders for a contract for the three-year period commencing February 1st, 1979. The tender information documents indicate that tenders would not be considered unless the tenderor had experience in the operation of a car parking facility. TAP had, of course, operated the airport facility for some years and appears to be a wholly owned subsidiary of Toronto Auto Parks Limited which operates parking lots in and around the Municipality of Metropolitan Toronto. Metropolitan operates parking lots in Montreal, Quebec, Hull and Ottawa, has experience at other Federal undertakings, and has recently moved into the Toronto area in search of business opportunities. Several companies, in addition to Metropolitan and TAP, tendered for the contract.

8. From an examination of the invitation to tender, it is evident that the business success and profitability of the venture is largely dependent upon the applicant's ability to frame a successful bid and, thereafter, maintain expenditures within the projected limits upon which the bid is based. The bid itself reflects its two principal components: manage-

ment fee and labour costs; however, as has already been mentioned, the bidder's flexibility with respect to the latter is circumscribed by the "fair wage" standards to which any successful bidder must comply. The bids were opened in late December, 1978 but it was not until February, 1979 that Metropolitan learned that it was the successful bidder. Stanley David, Metropolitan's Toronto area representative, then set about recruiting employees. Mr. David admitted that he was aware of TAP's relationship with the union and, further, that he was opposed to trade unionism. He also admitted that the unusual employee selection method which he used was adopted after taking the advice of counsel (not, be it noted, counsel who appeared on behalf of Metropolitan in this proceeding.) Mr. David maintained that his personal views concerning unionism had no influence on his hiring decisions.

9. On May 9 and 10, 1979, Metropolitan ran advertisements in the "Help Wanted" columns of two Toronto newspapers advertising full-time and part-time job vacancies for cashiers, parking attendants and persons with secretarial and supervisory skills. From May 9th to May 23rd interviews were conducted at the company's premises at 55 University Avenue and at a local "manpower office" on Wellington Street. A number of TAP's employees made application, as did many other people. TAP gave its employees time off in order to attend the interview, but there is no evidence that TAP gave any assistance to Metropolitan or that Metropolitan did, or wished to, make any effort to recruit TAP's work force *in toto*.

10. The employee selection was made from some two-hundred-and-seventy applications which the company received. Each of these applicants filled out an application form setting out his qualifications, experience, past employment record and references; and each applicant was individually interviewed. Mr. David initially testified that, thereafter, the applications were sorted into piles in accordance with job titles and employees were selected *at random*. Mr. David testified that no consideration was given to the employees' experience; no consideration was given to their references or past employment history; and no consideration was given to their actual, or possible, trade union sympathies. No consideration was given, therefore, to the very information which the company had elicited from prospective employees on their job applications and during the interviews. In particular, no special consideration was given to the employees of TAP who were thoroughly familiar and experienced in the operation of the airport parking facility and who, one might have thought, would have provided a pool of seasoned and knowledgeable employees from whom Metropolitan would make at least a preliminary selection. Of course, the active recruitment of TAP's employees would strengthen an inference of a business transfer. On the other hand, a blanket refusal to hire TAP employees might suggest an anti-union animus or a specific attempt to undermine employee rights under section 55. (See *Jimmy Z II*, [1977] OLRB Rep. Sept. 572, *Gordons Markets*, [1978] OLRB Rep. July 630, *Culverhouse Foods, Inc.*, [1977] OLRB Rep. Jan. 16.) It is obvious to the Board that the scheme adopted by the respondent is an attempt to conduct its affairs in such a manner as to minimize both of these possibilities.

11. On cross-examination, Mr. David was much more equivocal concerning the employee selection process. When pressed, he admitted that the company needed certain employees – especially supervisors – with proven skills, and that in making the selection of employees, this was taken into account. It was essential, he said, to get the work force assembled quickly and the company wanted to avoid problems of training. When pressed on whether the comments on the application forms had been referred to, he admitted that they had been for the supervisory personnel. Having regard to the totality of the evidence and the demeanour of the witness in cross-examination, we are not satisfied that the "random se-



lection” method was applied uniformly – particularly in respect of the supervisory employees.

12. Metropolitan also hired Mrs. Parkinson, the general manager of TAP. The decision to hire her was made directly by the president of Metropolitan, although Mr. David had met her previously on at least two occasions when he came to TAP’s office to see how the operation was run, and to acquire samples of the tickets and forms which TAP used. Mrs. Parkinson, as “manager”, remains in charge of the ongoing operations of the parking facility. Mr. David is the “Assistant Manager” but, he testified, this is a part-time position. He tries to visit the airport operation daily, but he also has supervisory responsibilities for other Metropolitan operations in the Toronto area. It is not really clear whether Mrs. Parkinson’s duties have changed or whether her role in Metropolitan’s organization is the same as her role with TAP. There was little evidence concerning TAP’s organization or system of management, the relationship between TAP and Toronto Auto Parks Ltd., or the role of Aaron Black, the principal owner of TAP. Within the Metropolitan organization Mrs. Parkinson’s authority is clearly limited. She undoubtedly co-ordinates and supervises the work of the employees but her independent decision making authority would appear to be quite minimal. Real management authority remains with Mr. David.

13. The number of TAP “bargaining unit” employees who were subsequently employed by Metropolitan is difficult to determine. The Board did not have before it a complete list of Metropolitan’s current employees – although Metropolitan did file the application forms which were sorted into groupings indicating those that the company hired and those which it intended to reject. The determination is complicated because, after its original hiring of some 120 employees on or about May 24th, the company has continued to hire from these applications. For example, an additional 27 employees were hired in order to take over the luggage cart retrieval aspect of the airport operation. In addition, some of the employees of TAP who were in the bargaining unit were hired by Metropolitan into supervisory positions. At the hearing the Board indicated that it might be useful to consider the employee list and union membership filed in the TAP certification application. Both counsel were agreeable to the Board making this comparison.

14. On the basis of the evidence before us we are satisfied that a substantial number of TAP’s bargaining unit employees are now employed in the same positions by Metropolitan. Indeed, it would appear that the majority of Metropolitan’s employees may have been employed by TAP. Of some 164 employees whom Metropolitan hired, at least 98 were employees of TAP. Equally interesting is a breakdown of the union affiliation among those employees who were selected and rejected. Although Metropolitan failed to hire some 20 union members and 4 non-union members, it did hire some 35 union members and some 23 non-union members.

15. As a result of the “random” hiring policy of Metropolitan, the company was in a position in which many of the employees were formerly employed by TAP, 6 or 7 of the 9 supervisors were employees of TAP and the general manager, Mrs. Parkinson, remained the same. Consequently, when on June 1st, 1979, the nominal employer changed from TAP to Metropolitan many (and perhaps the majority) of the bargaining unit employees of TAP who had been represented by the union found themselves working for a new employer in a situation strikingly similar to their former employment. The nature of the business was the same, their duties and responsibilities were the same, many of their supervisors were the



same, many of their fellow employees were the same, the general manager of the operation remained the same, and they were working with the same tools and equipment. There was no hiatus between the departure of TAP and the arrival of Metropolitan. From an employee perspective, the only real change is the colour of the uniforms.

16. The trade union contends that the “business” of operating the airport parking lot has been “transferred” (within the meaning of section 55 of the Act) from TAP to Metropolitan. Counsel points to the apparent retention of a number of TAP’s employees and much of its managerial structure, the expanded definition of the term “sale” and the remedial nature of section 55. With respect to the section 79 complaint, counsel points to the unusual and, in his submission, irrational, employee selection process, and argues that the Board should reject the evidence of Mr. David and infer an anti-union animus in his failure to hire the grievors.

17. The respondent submits that section 55 was never intended to apply to a situation such as the present one. There has been no “transfer” of TAP’s “business” to Metropolitan; the Federal Government has simply changed contractors. The respondent maintains that its refusal to hire the grievors was not motivated by any anti-union considerations.

## II

18. The basic rule in the successorship area is established by section 55 of the Act. The relevant provisions of that section are as follows:

“(1) In this section,

- (a) ‘business’ includes a part or parts thereof;
- (b) ‘sells’ includes leases, transfers and any other manner of disposition, and ‘sold’ and ‘sale’ have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.”

When a business (or a part thereof) is transferred, or disposed of, the transferee acquires the business subject to the collective bargaining obligations of the transferor, the union retains bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement (if any) to the unit until the Board otherwise declares. Since the bargaining structure inherited from the predecessor may be inappropriate, or create conflicts with the successor's pre-existing bargaining obligations, the Board is empowered to define and, if necessary, restructure the unit to suit the new circumstances. Likewise, if the successor employer significantly alters the character of the business, or intermingles the employees of the purchased business with those in its existing operation, the Board may redefine the bargaining structure or determine whether the union's bargaining rights should be continued (section 55(4)-(6)). However, until the Board otherwise declares, the transferee stands in the shoes of his predecessor with respect to established bargaining rights.

19. In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in "the employer" even where the plant equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section 55 avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining *status quo* by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded upon the statute) into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business." In *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 the Board described the effect of section 55 as follows:

"Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

20. The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interest of employees will be at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both. Of course, the transfer of the business is not the only occurrence which could frustrate employee expectations. A re-organization of the production process,

the introduction of “job destroying” technological change or a geographic move beyond the scope of the collective agreement will also materially change the industrial relations *status quo*. A business transfer, however, involves a new employer and raises legal problems of an entirely different order which cannot easily be accommodated in a bilateral bargaining process. It is to these problems that section 55 is addressed.

21. The “successor rights issue” is not a new one in Ontario. It was discussed by this Board in a number of early cases, (see, for example: *New Method Laundry and Dry Cleaners*, 57 CLLC ¶16,199; and *Brantford Product Co. Ltd.*, 61 CLLC ¶16,193); and was considered by both the Legislature’s Select Committee on Labour Relations (1957-1958) and by H. Carl Goldenburg, Q.C. in his *Report of the Royal Commission on Labour Management Relations in the Construction Industry*, (Queen’s Printer, Toronto, 1962, at pp. 44-47.) The Select Committee’s recommendation provides a useful description of the kind of situation to which section 55 gives rise:

“It is the recommendation of the Committee that where –

1. A Trade Union has been certified as the bargaining unit [sic] for the employees of an employer, or
2. Where an employer has entered into a collective agreement with a union, and where in either instance the facts establish that the plant, property, equipment, products and working force remain virtually unchanged as a result of the sale or other transfer-in-law of the business of the employer, and no essential attribute of the employment relationship has been changed as a result of the sale or other transfer-in-law, the certification and consequent obligation should continue or the collective agreement should continue to be binding, as the case may be, notwithstanding the change in legal ownership of the business enterprise.’”

22. The first successor rights provisions were enacted by *The Labour Relations Amendment Act, 1961*, S.O. 1961-62, c. 68. These were in all material respects similar to the present section 55, but the legislation was never proclaimed. When it was re-introduced as *The Labour Relations Amendment Act, 1962*, S.O. 1962-63, c. 70, there was a significant change. The subsection ensuring a “flow through” of the collective agreement [now section 55(2)] was omitted. The implication is that the Legislature intended only to preserve bargaining rights; it was not concerned with preserving the attributes of the employment relationship embodied in the employees’ collective agreement. The successor employer remained free to negotiate his own bargain.

23. In 1970 the Legislature significantly expanded the effect of the successor rights section by re-introducing the subsection preserving the collective agreement [now section 55(2).] This amendment abrogated the notion of privity of contract, and provided that the successor would be bound by the predecessor’s collective agreement. It is now up to a prospective transferee to investigate the terms of the bargain which the predecessor has made, and to see that this is taken into account in the transaction by which it acquires the business. It might also be noted that the amendment was part of a remedial package which contained section 1(4) of the Act – a section which, like section 55, prevents legal form or commercial law conceptions from dictating collective bargaining results. Section 1(4) provides:



“Where, in the opinion of the Board, associated or related activities or business are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant relief, by way of declaration or otherwise, as it may deem appropriate.”

Both section 55 and section 1(4) recognize that a “business” is not a precise legal concept, but rather an economic activity which can be conducted through a variety of legal vehicles or arrangements. It is this economic activity which gives rise to the employer-employee relationships regulated by the Act.

24. In 1975 the Legislature enacted section 55(13) which imposes upon the employer parties an obligation to adduce evidence concerning the transaction which gave rise to the allegation of successorship. Such evidence is almost always within the exclusive knowledge of the employer respondents, and prior to 1975 the Board had frequently declined to make a successorship declaration, citing lack of evidence. Section 55(13) was the legislative response. It is now much easier for an application trade union to establish the facts upon which a successorship declaration is based. Finally, in 1977, the Legislature enacted *The Successor Rights (Crown Transfers) Act*, S.O. 1977, c. 30 which is modelled on section 55, and ensures that transfers to and from the Crown will be treated in approximately the same way as transfers between private individuals – even though the subject economic activity and associated collective bargaining relationships may not arise in a purely business setting, and the motivation for the transfer is unlikely to be a purely commercial one. The passage of *The Successor Rights (Crown Transfers) Act* reverses an earlier decision of the Board holding that transfers from the Crown to the private sector were beyond the reach of section 55. The broad definition of “business” included in the Act recognizes the diversity of economic activities to which it might be applied.

25. The successorship rights “problem” is not unique to Ontario. All Canadian jurisdictions have some form of successor rights legislation. [See, for example, the *Canada Labour Code*, R.S.C. 1970, c., L-1 (as amended) section 144; *Quebec Labour Code*, R.S.Q., 1964 (as amended) section 36; and *Labour Code of British Columbia* Stat. B.C. 1973 c. 122 (as amended) (section 53.)] In the United States, although there is no successor rights legislation, the National Labour Relations Board and the Courts have created a “common law” doctrine of successorship. (See, for example: *N.L.R.B. v. Burns International Security Services Inc.*, et al., (1972) 80 LRRM 2225, 406 US 272 (U.S.S.C.) and generally C.J. Morris ed. *The Developing Labour Law*, B.N.A. Washington, 1971 and cumulative supplements.) The American doctrine is based upon the employer’s obligation to recognize the “majority union” and, accordingly, considerable emphasis is placed upon whether the majority of the new employer’s workforce consists of hold-overs from the previous employer. A “flow through” of the collective agreement has a different statutory basis and, in practice, is much less likely. In contrast, Canadian legislation and Labour Board decisions have focused on the transfer of the business entity or activity *as a whole*, and have accorded less importance to the continuation of the predecessor’s employees. The intermingling provisions permit a test of the union’s continued employee support, while in Canada the “flow through” of the agreement is usually automatic.

26. The legislative history in this jurisdiction reveals an unbroken trend towards increased protection for employees and their union, and a concomitant increased obligation imposed upon successor employers. Legal doctrines such as “the corporate veil” or “privity of contract” have been de-emphasized, modified or eliminated so that a collective bargaining framework can be developed which will be in accord with industrial relations realities. Not surprisingly, the Board decisions follow a similar trend and, as a result, early decisions do not provide an unfailing guide to the results in later ones. Not only has there been a change in the statutory framework, but as the Board has accumulated experience and encountered more sophisticated business arrangements, there has been a development of its jurisprudence. It is important to emphasize, however, that section 55 of the Act has never been regarded merely as an “unfair labour practice” provision, directed at “schemes” designed to subvert bargaining rights. The section is also intended to preserve bargaining rights in the case of *bona fide* business transactions (i.e., transactions undertaken for purely commercial reasons and untainted by any anti-union motivation) which *incidentally* undermine the industrial relations *status quo*. This two-fold purpose was discussed by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

“The purpose of section 47a [now section 55] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect “paper transactions”, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond “paper transactions” to achieve that purpose. See e.g. *Kem’s Masonry*, [1964] OLRB Monthly Rep. December 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.”

In recent years most of the litigation before the Board has involved increasingly complex, but *bona fide*, business transfers which result in the same kind of dislocation as a simple bilateral sale. Collusive arrangements, or transactions explicitly designed to subvert bargaining rights, have become much less common; and can, in any event, be dealt with under sections 56, 58 and 61 of the Act. (See, for example: *Sun Parlour Greenhouse* [1964] OLRB Rep. Jan. 94; *Intermountain Industries Ltd.*, [1975] 1 Can.LRBR 257 (B.C.L.R.B.);



*Academy of Medicine*, [1977] OLRB Rep. Dec. 783; and, more recently, *Humber College*, [1979] OLRB Rep. June 820.) In the present case, there is no allegation that TAP and Metropolitan have been involved in an illegal scheme to undermine bargaining rights.

### III

27. The task of the Board in any particular case is to determine whether there has been a “transfer” or “disposition” of a “business” within the meaning of section 55 of the Act; and, if necessary, to sort out conflicting bargaining rights or problems of bargaining structure. Following the decision of the Court of Appeal in *R. ex rel Kitchener Food Market Ltd., et al.*, (1966), 54 D.L.R. (2d) 219, and the enactment of what is now section 55(12), the Board’s decisions in this regard have become “final and conclusive for the purposes of the Act.” It is the Board, therefore, which must give a meaning to the statute which will effect the legislative intention. The Board has always construed the terms “sale” and “business” broadly, in view of the collective bargaining purpose which the concept of successorship was designed to achieve. As the Board noted in *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052:

“It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act*, R.S.O. 1960, c. 191.) Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.”

Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. Likewise, the meaning given to the terms “business” or “disposition” in other statutes is of limited assistance in determining their meaning in *The Labour Relations Act*.

28. A section 55 application really involves two related questions: has there been a “sale” within the extended statutory definition of that term; and does what has been “sold”, “transferred” or “disposed of” constitute a “business” or “part of a business”. There is seldom any problem with respect to the first question. The Board has consistently followed the approach taken in *Thorco*, *supra*:

“According to its strict signification, the term sells is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a, [now section 55] however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part thereof. In legal parlance the word lease generally denotes a spec-



ific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.

The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interest, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words 'any other manner of disposition' is not intended to be in any way limited or interpreted ejusdem generis with the words leases or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words 'and any other manner of disposition' as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers."

The Board has found a transfer of a business, through a "chain" transaction, or sequence of sales (*Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691; *Trenton Riverside Dairies*, [1964] OLRB Rep. May 72), a corporate reorganization and merger, (*Eaton Yale Ltd.*, [1971] OLRB Rep. Oct. 667; *Westeel-Rosco Ltd.*, [1966] OLRB Rep. Dec. 718) and through the offices of a receiver where "the business" has been transferred as a going concern (*Marvel Jewelry Ltd.*, [1975] OLRB Rep. Sept. 733; *Field-Price Ltd.*, [1973] OLRB Rep. Oct. 543; *Parnel Foods Ltd.*, [1971] OLRB Rep. Nov. 715.) The manner of disposition is irrelevant so long as a transfer has, in fact, taken place. The interposition of a third party, acting as an agent or conduit, does not affect the result.

29. A more difficult question is whether it is the predecessor's "*business*" which has been transferred and continued by the successor or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. Unlike *The Successor Rights (Crown Transfers) Act*, *The Labour Relations Act* does not contain a statutory definition of "business", and it is the Board, therefore, which must develop an appropriate meaning. In *Raymond Coté*, [1968] OLRB Rep. Mar. 1211 the Board commented:

"The meaning to be attached to the word 'business' depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is 'the totality of the undertaking.' The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a

hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.”

While one usually thinks of a business as a profit-making economic activity, the term “business” in *The Labour Relations Act* cannot be so restricted. The Act also applies to municipalities, public libraries, universities, school boards, hospitals and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of “business” must be broad enough to include them. Even a wholly commercial enterprise will consist of many elements, some of which will be integral, and others merely incidental, to the total undertaking. And, in the case of undertakings in the service sector, “know how”, managerial systems and other intangibles are likely to be more important factors in the overall organization than particular physical plant and equipment.

30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a “going concern”, something which is “carried on.” A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a “business” from an idle collection of assets. This notion is implicit in the remarks of Widjery, J., in *Kenmir v. Frizzell et al*, [1968] 1 All E.R. 414 – a case arising out of legislation similar to section 55. At page 418 the learned judge commented:

“In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. *In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption.* Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. *The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.*”  
[Emphasis added]

Widjery, J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery, J. and the Board is whether the transferee has acquired from the transferor a functional economic vehicle.

31. In determining whether a “business” has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor’s business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business – albeit with a change in the nominal owner. The Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed) commented:

“In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or nonexistence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business.”

The issue before the Board remains whether there has been a “transfer of a business”; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of all the other elements of the predecessor’s business. If the elements formerly used by “A” to carry on business are now in the hands of “B”, and used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer from “A” to “B” – albeit complex and indirect, and perhaps even by operation of the law.

32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55. This approach has not only been taken by the Board in a number of cases (see, for example, *Culverhouse*, *supra*, and *Dennis Moran* [1977] OLRB Rep. Apr. 277) but also appears to have been adopted by the British Columbia Supreme Court in *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41. In that case, the Court



was considering an application for *certiorari* in respect of a decision involving what was then the successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J. characterized the question before the Board as follows:

“One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the ‘business’ in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.*” [Emphasis added]

Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

33. There need not be a transfer of the entire business before section 55 comes into play. The successor rights provisions may also be triggered by the transfer of “part of a business.” [See section 55(1).] This language suggests that bargaining rights continue when something considerably less than “the totality of the undertaking” has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of “the business.” The Board has found a transfer of “part of a business”, where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1979] OLRB Rep. Apr. 119; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there is a transfer of the right *and means* to produce one of the products formerly produced by the predecessor’s business; (*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Co. Ltd.*, [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Ltd.*, [1971] OLRB Rep. May 515.) In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization – managerial or employee skills, plant, equipment, “know how” and goodwill – thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union’s right to bargain about them, were preserved. The part of the predecessor’s business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. It was otherwise in *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, *Canada Cement LaFarge Ltd.*, [1975] OLRB Rep. Dec. 905, and *Dufferin Steel*, [1976] OLRB Rep. Mar. 81. In these cases there was a significant change in the character of the work, product or market so that the Board concluded that what had

been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization – even though each of the elements acquired could previously be found in the predecessor's business organization and, in that sense, were “part” of the predecessor's business. What was transferred lacked that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern.

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a “business”, or “a part of a business” and the transfer of “incidental” assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a “new” business which resembles the “old” one in many respects. In *Ralph Ford Electrical*, [1974] OLRB Rep. June 388, for example, several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer. In that case the Board found that there was not a transfer of a business, but rather the creation of a new “parallel” business which only incidentally made use of some of the tangible elements of the predecessor's business organization. Similarly, in *Sunnybrook Food Mkt.*, [1974] OLRB Rep. Jan. 47 the continuation of a grocery business on the same premises, and with some of the same fixtures, was not enough to support a successorship finding. The Board was not satisfied that there had been a transfer and continuation of the *predecessor's business* (i.e., the business that he *owns and operates*) but simply the continuation of a like business. It is recognizable that so long as there is a market for a product, some entrepreneur is likely to appear who will produce for that market and, in so doing, he may share many of the characteristics of his alleged predecessor.

35. In assessing the facts from which a transfer of a business may be inferred, the Board has always been especially sensitive to any pre-existing corporate, commercial or familial relationship between the predecessor and the alleged successor; or between the predecessor, the alleged successor and a third party. Transactions in these circumstances require a more careful examination of the business realities than do transfers between two previously unrelated business entities. The presence of a pre-existing relationship may suggest an artificial transaction designed to avoid bargaining obligations; or (more commonly) there may be a transaction in the nature of a business re-organization which does not alter the essential attributes of the employer-employee relationship, and which should not, having regard to the purpose of section 55, disturb the collectively bargained framework for that relationship. A business may have created a new legal vehicle to carry on all or part of its activities, or it may have redistributed those activities among its existing legal components without changing its essential character or the identity of its real principals or proprietors. The separate legal identity of the components may be superfluous from an economic view point, and there may be an *actual* transfer of business activity from one to the other, even though there is little evidence of a transfer of tangible assets, goodwill, etc. In reality, the employer's business may not be exclusively “his” to transfer, for a common principal, shareholder or corporate parent may have the effective power to extinguish an apparently independent business and transfer its economic functions to another. If both businesses are also “in the same business”, (i.e., supply the same product in approximately the same way and



potentially to the same market or customers) a transfer of a business may have occurred but may be very difficult to detect. In such circumstances it may be important to carefully examine the pre-existing links or lines of common control to which the alleged predecessor and successor are both subject. Such examination is precisely what is undertaken by the Board on an application under section 1(4); but it is also relevant on section 55 applications, and it is for this reason that applicants commonly plead section 1(4) in the alternative. It would be incorrect to make this consideration a decisive “test” for successorship; but where there is a pre-existing corporate connection between the predecessor and the successor the Board has been disposed to infer a “transfer” if there is the slightest evidence of such transaction. (See: *Zehrs Markets*, [1975] OLRB Rep. Jan. 48). The pre-existing “nexus” between the respondents inevitably colours the Board’s view of facts. As a practical matter, it is much more difficult to sustain the contention that one has not acquired a predecessor’s business but merely founded a new, independent, but similar, business serving the same market. (See, for example: *Thorco*, *supra*, where a firm closed down one of its manufacturing operations and transferred its equipment to a recently incorporated related company; or *Gordons Markets*, *infra*, paragraph 40. In both cases the transaction also looked like a scheme to avoid bargaining rights.)

36. Despite the labour relations focus of the statute “the business” is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employee may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor’s employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd. et al.*, (1978) 1 Can. LRBR 565:

“The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals*. Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it. . .

*But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand. [Emphasis added]*



A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 – a case which, like the present one, involved the consequences of a loss of a contract:

“There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.”

The focus of section 55 is the business entity – the employer’s total economic organization – not simply the work which the employees perform.

37. The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A’s employees within A’s own organization are “contracted out” to B, and B uses his own managerial skills, plant, equipment and “know how” to supply to A, for a price, the product, services, facilities or components formerly produced by A’s employees. A, therefore, is contracting for the use of B’s economic organization in lieu of his own. A is generating a particular demand, or market, for B’s product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfill A’s requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B’s economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of “part of a business”) or merely permitting B to make use of his (A’s) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, “but for” the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A’s business – albeit a part which A no longer wishes to operate itself.

38. Similar considerations apply where A, for his own business reasons, chooses to change subcontractors and purchase his requirements elsewhere. Here also there would be a continuation of the work performed, and the new subcontractor may find itself in the same

position of economic interdependence *vis-a-vis* A as a previous subcontractor. Again, these factors do not, in themselves, determine the applicability of section 55. Essentially the matter remains one of characterization. Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor's ability to produce the goods or supply the services formerly produced by the predecessor? Has the successor acquired all, or a coherent and severable part, of the predecessor's economic organization? And to repeat the words of Widjery, J. in *Kenmir*, *supra* has the transaction put the successor in possession of a going concern, the activities of which he could then carry on without interruption? A transfer of work, by itself, is simply not enough to ground a section 55 finding.

#### IV

39. In argument counsel referred the Board to two earlier cases which, it was said, set out the principles which should be applied in the present case. It may be helpful, therefore, to refer briefly to each of these earlier cases; although, in our view, both are distinguishable from the one now before us.

40. In *Gordons Markets a Division of Zehrmart Ltd.*, [1978] OLRB Rep. July 631 (application for judicial review dismissed November 21, 1978.) Loblaws had negotiated with Cambridge Leaseholds for the surrender of its food store lease, conditional upon *Zehrs*, a related company, entering into a new, but equivalent, lease for the duration of the term of the lease Loblaws sought to surrender. Zehrs argued that there was no disposition as between Loblaws and Zehrs, but rather two separate transactions with Cambridge Leaseholds – an independent third party. In addition, Zehrs argued that, if anything was transferred, it was the land and premises, not “the business.” The Zehrs operation was characterized by the respondent as a “new”, “similar” business, not a continuation of Loblaws’ business. The evidence suggested, however, that the entire transaction had been constructed with section 55 in mind, for Zehrs had intentionally refused to hire Loblaws’ employees in order to weaken the link between Loblaws and foreclose the possibility that these employees might seek to exercise their rights under section 55. This admission of a “scheme” to avoid bargaining rights, and the pre-existing corporate links between Loblaws and Zehrs made it much easier for the Board to find a transfer of a business – notwithstanding the novel form of the commercial transaction giving rise to the successorship. At page 636 the Board summarized its findings:

“22. In the instant case, having regard to the evidence and the Board’s jurisprudence, and despite the lack of evidence of direct contact between Loblaws on the one hand and Zehrmart or Gordons on the other, the Board is satisfied that the tripartite transaction did not merely mark the establishment of a similar or parallel business, but that the lease arrangement with Zehrmart marked the transfer of Loblaws’ business to Zehrmart with Cambridge acting as the necessary conduit. For the following reasons we are satisfied that Zehrmart’s new business, run though its Gordons Markets division, drew its life blood from Loblaws and constitutes a continuation of Loblaws business.

23. As emphasized in the *Dutch Boy* decision, *supra*, much of the goodwill in the retail food industry attaches to the location of a store and the habit of customers patronizing the food market located on the

particular premises. Unlike the *Sunnybrook Food Markets* case, *supra*, Loblaws moved out of the Windsor area completely and could take none of its customers with it. As well, although there was a six month hiatus between the closing of Loblaws and the opening of Gordons, the premises were never advertised for rent and it was clear that the renovations being made were for a new supermarket and not for some other retail use. Unlike the *Zehrs Market* case, *supra*, therefore, the goodwill which attached to the Loblaws premises was not lost between the closing and the opening and was, in the Board's view, transferred from Loblaws to Gordons through Cambridge Leaseholds.

24. The Board attaches no weight whatsoever to the fact that Gordons did not hire Loblaws employees. If the mere failure of the successor employer to hire the same employees could defeat a section 55 application, the purpose of the successor rights provisions could be completely undermined. While in some cases, the existence of the same employees is a helpful indicator in determining whether or not there has been a continuation of a business, the Board, in the circumstances of this case, where the successor employer admitted not hiring employees specifically to negate a possible link between Loblaws and itself attaches absolutely no significance to the fact that there were no employees of Loblaws hired by Gordons. We note as well that in the *Dutch Boy* case, *supra*, and *Leader's Clover Farms*, *supra*, where the Board found that there was a sale of a business, the successor employer had not hired any former employees.

25. Part of Loblaws' business may be defined by the nature of the lease arrangement it had with Cambridge. The Board agrees with the submissions of counsel for the union that in most of its significant elements, Cambridge plugged Gordons into the old lease arrangement. Although there were some alterations in the lease, the situation looks more like one where Zehrmart simply took over Loblaws' old lease rather than entered an entirely independent lease arrangement of its own. We note for example that the lease runs for a time equivalent to the remaining term of the original lease with Loblaws; it establishes the same rent and in each case the premises could be used only as a supermarket. The continuity of the two transactions is further marked by their precise timing: the surrender took effect on September 30th, the new lease took effect on October 1st and each aspect of the arrangement was conditional on, rather than independent of, the other."

As in *Culverhouse* and *Thorco* the Board looked for continuity of the essential elements of the business and sought to trace those elements into the hands of the alleged successor in order to decide whether the successor's business "drew its life" from that of the predecessor or, alternatively, was a new, "similar", "parallel" business. As in *Radio CJYC Ltd.*, *supra*, the Board emphasized that the continuity of employees was only one factor to be considered.

41. In the present case, we are also faced with what might be characterized as a "tri-



partite” transaction and here, too, the respondent points to the absence of a direct transfer of tangible assets from TAP’s business operation to that of Metropolitan. As in *Gordons* the alleged predecessor and successor carried on business at a particular location, and had a similar commercial arrangement with a third party; and, again, the respondent contends that it is operating a “new, “similar” or “parallel” business. However, there is no corporate relationship between TAP and Metropolitan, and the competitive bidding process cannot be viewed as an attempt to rationalize business operations, or re-organize market shares, as between two separately incorporated “divisions” of a “corporate family.” Nor can it be regarded as an artificial transaction designed to avoid a continuation of bargaining rights. TAP and Metropolitan were active competitors and there is no evidence that TAP’s departure from the scene and the consequent transfer (if any) of the parking operation to Metropolitan was even voluntary. Furthermore, there was no evidence that any benefit flowed to TAP, or a related third party, from the transaction. There was no consideration passing to TAP, there were no proceeds of disposition, and neither the shareholders or creditors of TAP received any advantage, directly or indirectly. TAP has not disposed of the bargaining rights at the airport location, nor is there any evidence that the transaction was structured in order to accomplish this purpose. Although the location is the same, this would be so regardless of who was operating the airport parking lot; and it will be observed that the parking lot is not equivalent to the premises and trade fixtures in *Gordons*. While Metropolitan undoubtedly works on the parking lot premises, they are not an earning asset which is used to derive Metropolitan’s profit or revenues. It is the Federal Government which sets the fees and derives the revenues from the operation of the lot. Neither TAP nor Metropolitan derive their profit from dealings with the lot’s “customers.” Their customer is the government. In these respects the present case is distinguishable from *Gordons*, as well as from those cases in which a business is disposed of through a receiver acting as agent for the predecessor or its creditors.

42. Both parties also referred to, and relied upon, the decision in *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467. That case involved ambulance services – a closely regulated and licenced activity in which the Ministry of Health (MOH) owns and maintains the vehicles and ancillary equipment, provides the required funds, sets a global budget and issues the necessary licences. The services were originally operated by, and from, two hospitals; but following an MOH decision that the service should be consolidated, both hospitals decided to discontinue their respective services. When proposals for the establishment of a new amalgamated ambulance service were solicited, the director of the operation at one of the hospitals, Mr. D.L. Rudyke, applied, was successful, and subsequently carried on business using the same employees who had worked for the hospitals. All such employees who applied were hired, and they continued to carry on their duties in the same manner, under the same wages as before. There was no hiatus between the withdrawal of the hospitals from “the business” and the commencement of the “new” business.

43. The situation in *Thunder Bay Ambulance* has many features in common with the present case. There are, however, some significant differences. In *Thunder Bay Ambulance* it was the manager of the alleged predecessor who caused the successor to be incorporated and who actively sought to preserve the established organization and employee complement. The know how and expertise required to acquire the licence, and thereafter run the service, was entirely traceable to the predecessor’s organization, and remained in that organization until the moment of the transfer. There was, therefore, a close pre-existing relationship between the predecessor and the successor, quite apart from the fact that they both

served the same “market” or “customers”. This relationship is similar to the one which was present in *Ralph Ford Electrical*, *supra* but, unlike that case, the predecessor did not remain “in business” as an active competitor. Mr. Rudyke acquired his business opportunity as a result of his relationship with the predecessor hospital but not in competition with the predecessor, who had, by this time, willingly withdrawn from the field. In the circumstances it was much easier than in the present case to find that the operation had not been discontinued at all, but rather was transferred intact to the successor. In the present case, Metropolitan is entirely independent of TAP and has been actively engaged in business long before the transaction here under consideration. Indeed, such had to be the case, since the bidding was restricted to firms “with substantial and recent experience in the operation and maintenance of a car parking facility.” Moreover, the very nature of the subcontracting process made TAP vulnerable to its competitors. It had an assured customer for only three years unless it was sufficiently competitive to ensure a renewal of its contract. It was clear, *ab initio*, that it must meet the competition or lose its customer. Its right to carry on business at the airport was a limited one, which could not even be assigned without the consent of the Federal Government. The context is, therefore, quite different from that of *Thunder Bay Ambulance*.

## V

44. For a transaction to be considered a “sale of a business” there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a “going concern.” A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfers *his* business. The use of the active verb and possessive pronoun is not insignificant.

45. TAP’s business involved several components. Most important, there was the “know how” to frame a successful bid in order to acquire and keep the contract. This involves the ability to digest the mass of statistical data appended to the invitation to tender (air passenger volumes, parking volumes, etc., broken down on various bases), the ability to project an accurate estimate of cost and the ability to implement an efficient management and cost control system. These skills were apparently embodied in the person of A.S. Black (just as in *Thunder Bay Ambulance* they were embodied in the person of D.L. Rudyke) and they remain with TAP (which may still be able to regain its old position.) Metropolitan was engaged in a similar, parallel business long before 1978 and, in its own right, possessed the business expertise and “know how” required to run the parking lot. Metropolitan is a well established organization and needed only to hire additional employees to work at its new location. No doubt it was convenient for Metropolitan to hire TAP’s employees (and, but for the unusual selection process which it adopted, and to which we will refer *infra*, it might have hired more); but there is no evidence that there was any pre-arranged plan for so doing, or that any of them were approached until well after Metropolitan had established itself as the successful bidder. Nor is there any evidence that Metropolitan’s business would be much different if they had never been hired or resigned en masse tomorrow. In the circumstances of this case, we cannot find that TAP has transferred to Metropolitan either its “business” or economic organization, or a viable “part” of its business which Metropolitan could then “carry on” in order to derive new revenue or financial reward. Even if we accept



that in the service sector tangible assets are relatively less important, and we adopt the analysis of the Board in *Thunder Bay Ambulance*, we simply cannot find, on the evidence, that there is a transfer and continuation of TAP's organization. At most, Metropolitan has hired a number of individual employees who had become redundant to a contracting business enterprise. For the reasons which we have already given, we do not think that their re-employment by Metropolitan in jobs similar to those they occupied at TAP is sufficient to establish that there has been a transfer of TAP's "business" to Metropolitan. Metropolitan was, and is, a successful competitor. It competed "for TAP's business" in a colloquial sense, but it did not acquire all or part of TAP's business within the meaning of section 55.

46. In reaching our conclusion we are not unmindful of the rights of the employees and their union, nor have we rejected the applicant's contention that the "mischief" present here is virtually identical to that which section 55 is designed to remedy. There is no doubt that the periodic retendering of the management contract can frustrate the employees' established collective bargaining rights, threaten their job security, and significantly undermine the possibility of establishing a stable collective bargaining relationship at the parking location. The need to continually reorganize the individuals employed at the site not only poses a problem for the trade union, but also for the Federal Government and any previously unorganized subcontractor who becomes the successful bidder. There may well be a new application for certification, a new round of bargaining and threat of industrial conflict and disruption of service each time a new employer takes over. This is obviously not the intention of the parties (indeed, the Federal Government has attempted to ensure a measure of equity and stability by requiring adherence to an established "fair wage" schedule) but it will be the result of the transaction where the circumstances are similar to those existing in the present case. And, for the reasons which we have already set out, we do not think section 55, as presently drafted, can cover the situation. To so hold, in the present case, would be to root bargaining rights in the location, the employees or the work, rather than "the business." Whatever may be the case in other subcontracting situations, we do not think the change of subcontractors in the circumstances of this case constitutes a transfer of a business from one to the other.

47. We turn now to the section 79 complaint. We are satisfied that, in rejecting the grievors' request for employment, the respondent did not specifically advert to their union activity. We are also satisfied that, if TAP's employees had not supported a trade union their applications for employment would have been considered on their merits. The method of "random selection" was chosen because the company was aware of the employees' trade union affiliation and wanted to hire as few of them as possible. This would weaken the link with TAP in any subsequent successor rights application, and would make it less likely that, even if there was no successor rights finding, the entire mass of union supporters would be acquired. The company could not reject TAP employees outright without signalling its true intention, nor could it employ a rational employee selection process, since a consideration of the employees' skills, ability or experience would inevitably result in hiring the bulk of TAP's work force. If Metropolitan acquired virtually all of TAP's work force this would be a factor to be considered on a section 55 application but, equally important, it would be acquiring a work force with proven union sympathies which the union would be readily able to reorganize and certify. There are many business reasons why an employer might wish to reject the established work force, but none were sustainable in the present case.

48. The situation of the grievor highlights the issue. We have the uncontradicted evi-



dence of Mrs. Parkinson, the general manager of both TAP and Metropolitan, that the grievors were capable employees, whom she would not hesitate to hire. She testified, and we accept this testimony, that their trade union activity would have no effect on her decision. The same cannot be said for the decision making of Mr. David. He was obviously concerned enough about the possibility of the operation becoming unionized that he consulted counsel about it, and thereafter he refused to consider criteria which a reasonable business man would have considered, but which, in this case, were correlated with the individuals' trade union affiliations. This is a more subtle form of discrimination than an outright refusal to employ TAP's employees; but for many individuals it had exactly the same effect. They were denied the opportunity for a fair appraisal of their application for employment solely because they were trade union supporters. In our view this is the only reason why an employer would go through the process of soliciting applications which list an employee's training experience and references, conduct personal interviews of the applicants, but then hire at random. We do not suggest that Metropolitan was required to hire TAP's employees, or even give overriding weight to the applicants' past experience with TAP. The respondent was entitled to hire what it considered to be a qualified work force and to unilaterally set terms and conditions of employment. What the respondent is not entitled to do is to exclude from its considerations relevant criteria (and, therefore, persons, from employment) solely because of an anti-union motivation.

49. There remains the question of remedy. In framing a remedy the Board must attempt to put the grievors into the same position as they would have been in had there been no breach of the Act. This would be a difficult task in the present case since, as we have said, all of the TAP employees, including the grievors, have been denied a chance for a fair appraisal but would not necessarily have been hired even if such appraisal had been carried out. We have neither the evidence, nor the inclination, to speculate about the results of such appraisal or to "second guess" the respondent's decisions. We do, however, have the unequivocal evidence of Mrs. Parkinson that the grievors were capable employees whom she would not hesitate to hire. Mrs. Parkinson repeated this assessment on the date of the hearing when, it might be noted, the grievors again requested employment. Thus, with respect to the grievors, we need not speculate. We are satisfied that had the respondent adopted a hiring system free from anti-union motivation the grievors would have been hired in the first instance. We therefore direct that the grievors be hired forthwith and compensated for any and all losses since June 1, 1979 – the date on which Metropolitan commenced operations. This compensation award is, of course, subject to the usual rules respecting mitigation and the Board will remain seized in the event there is any difficulty in calculation or implementation.

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**1050-79-R** United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Norcan Developments Ltd.**, Respondent, v. Group of Employees, Objectors.

**Certification – Membership Evidence – Petition – Objectors alleging purpose of membership card misrepresented – Allegations of misrepresentations and extortion not established by evidence – Employer and objectors discussing opposition to union**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

**APPEARANCES:** *W. Dubinsky, W. Sherman and Kai Pedersen for the applicant; Kornelius Ens for the respondent; Arthur Kampen and Thomas James for the objectors.*

**DECISION OF THE BOARD;** December 13, 1979

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

2. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

3. The Board further finds that all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foreman, and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board heard evidence and argument with respect to the origination, preparation and circulation of two statements of desire which were filed in opposition to this application and also with respect to allegations of improper or irregular conduct on the part of William Sherman, a representative of the applicant. More specifically, it was alleged by Arthur Kampen, one of the objectors, that Mr. Sherman gave him the impression that he was required to sign an application for membership in order to avoid conflict with the local Carpenters' union and that the signing of this application for membership did not mean that he was joining the union. The signing of the membership card was represented, according to Mr. Kampen, as being for his own protection while he was working in the Kenora area.

5. The applicant denied these allegations of improper or irregular conduct and further denied misrepresenting the nature and purpose of signing the application for membership in the applicant.

6. The two objecting employees, Thomas James and Arthur Kampen, gave evidence before the Board. William Sherman, the applicant's business representative, and Kai Pedersen, an area steward for the applicant, were called as witnesses by the applicant.

7. There is nothing in the evidence which indicates that Messrs. James and Kampen signed applications for membership in the applicant against their will. The question to be answered is whether there was a misrepresentation of the nature of the documents signed by these two men and the purpose for signing such documents.

8. Messrs. James and Kampen each signed a combination application for membership and receipt with respect to the applicant at the instigation of Mr. Sherman. At this time Mr. Sherman was accompanied by Mr. Pederson. During the course of the hearing the attitudes of Messrs. James and Kampen to Mr. Sherman was extremely hostile and on occasions even belligerent. These attitudes appeared to have developed after the signing of the combination applications for membership and receipts. At the time of the signing, relations among the four men appear to have been not unfriendly.

9. In considering the evidence of the four men, the Board notes that Messrs. Sherman and Pederson gave their evidence in a coherent manner and that their credibility was not shaken on cross-examination. On the other hand, Messrs. James and Kampen gave their evidence in a manner that was often argumentative and belligerent. On cross-examination a number of inconsistencies were exposed in their evidence. For example, in giving his evidence-in-chief, Mr. James said that he did not know he was joining a union. In cross-examination, however, Mr. James stated that Mr. Sherman asked for his name and address and at the same time stated that he would like to have Mr. James and Mr. Kampen in his union. Mr. James also added that, "He signed us up. He explained the big area the union covered.". In another critical area of the evidence Mr. James testified that he and Mr. Kampen did not know what they were signing because Mr. Sherman covered the upper part of the document when they signed. The Board notes that even in the two places where Mr. James signed the words "signature of applicant" appear.

10. Mr. Kampen, on the other hand, in his evidence dealt with the impressions that he received during the conversation with Mr. Sherman. He had the impression that he should just sign the document and also had the impression that it would be like a temporary work permit to avoid any confrontation. Mr. Kampen offered no reasonable basis for his impression. He never stated that the words "work permit" were used. Mr. Kampen informed the Board that Mr. Sherman asked for his address and telephone number and then informed the Board that Mr. Sherman had not asked for his telephone number. Mr. Kampen also testified that he filled out the blank spaces on the document only to subsequently change his testimony and admit that Mr. Sherman filled out the blank spaces on the document. Mr. Kampen also testified that Mr. James and not Mr. Sherman held his own document while he signed it. This is in direct conflict with Mr. James' testimony that Mr. Sherman covered the upper part of the document when he signed it.

11. Messrs. James and Kampen also gave evidence concerning the origination and preparation of their statements of desire in opposition to this application. It is clear that there was discussion about this application, the applicant, the evidence of membership and the employees' response between Messrs. James and Kampen and the owner of the respondent, Harold Barg.

12. Mr. Sherman testified that he used the word "protection" in speaking to Messrs. James and Kampen but only in the context of advising them not to tell their employer that they had signed applications for membership in the applicant until after certification because their boss might fire them. Mr. Sherman also testified that he informed Messrs. James and Kampen that he would be making an application for certification.

13. It appears to the Board that the testimony given by Messrs. Sherman and Pedersen is to be preferred to the testimony of Messrs. James and Kampen. There were a number



of inconsistencies in the testimony of Messrs. James and Kampen. The testimony of these two men, in our view, was, for the most part, a product of vivid imaginations and an impression of the circumstances surrounding their signing of applications for membership and receipts in the applicant which is not borne out by the surrounding circumstances. In particular, we find that Mr. Sherman was not engaged in selling protection to Messrs. James and Kampen. Quite apart from the finding on the evidence before it that Mr. Sherman was not engaged in extortion, the very circumstances surrounding the signing of the applications for membership make it unlikely. Firstly, would an extortionist give his victims a signed receipt and, secondly, would an extortionist likely be satisfied with merely obtaining the sum of two dollars? We think not.

14. On the issue of the voluntariness of the two statements of desire, the Board is not prepared to accept the evidence of Messrs. James and Kampen that it was their own idea to oppose this application for certification. There are serious issues of credibility which affect the evidence of these two men and, in our view, Mr. James put his finger on it when he said that, "The reason we are here is because the company does not want the union and we don't want the union". In addition, other remarks by Mr. James spoke volumes about discussions with the respondent in the event that the Board issued a certificate to the applicant. He stated that, "The whole matter should be dropped. Even if the company is certified, it would be a matter of my partner and I taking a subcontract. There's no benefit to the union. It would lead to hardship all round."

15. In summary, the Board finds that the two employees knowingly signed applications for membership in the applicant. In addition, the Board is not prepared to find that their statements of desire represent their voluntary wishes.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 25, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

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**1004-79-U United Steelworkers of America, Complainant, v. Radio Shack, Respondent.**

**Collective Agreement – Damages – Duty to Bargain in Good Faith – Interference in the Trade Union – Company violating several provisions of Act – Offering voluntary revocable check-off of dues – Whether maintaining minimum statutory position on union security bargaining in bad faith – Broad remedial order issuing – Damages awarded to Union and Employees**

**BEFORE:** George W. Adams, Chairman, and Board Members C. G. Bourne and O. Hodges.

**APPEARANCES:** *James Hayes for the Complainant; R. A. Werry for the Respondent.*

**DECISION OF THE BOARD;** December 5, 1979

1. The Respondent's name is amended in the complaint to read Radio Shack.
2. The Complainant brings this complaint on behalf of itself and all employees in the bargaining units it represents at the Respondent's distribution centre in Barrie, Ontario. It complains that the employees and their union have been dealt with by the Respondent contrary to sections 14, 56, 58, 59, and 61 of *The Labour Relations Act*. The relief requested is substantial. The Complainant's request was set out in Schedule "A" to its application.

**"SCHEDULE 'A'**

The Complainant requests that the Board order the following relief:

1. Declaration that the Respondent has violated *The Labour Relations Act*.
2. That the Ontario Labour Relations Board determine all outstanding issues and direct that the parties execute a collective agreement.
3. In the alternative, that the Ontario Labour Relations Board appoint an arbitration board to determine all outstanding issues, and direct that the parties execute a collective agreement incorporating the terms settled by the aforementioned arbitration board.
4. In the further alternative, that the Complainant union be compensated for all its organizing, negotiating, strike administration, and legal expenses associated with its attempt to pursue its statutory rights in connection with Radio Shack.
5. In the further alternative a direction that the Respondent bargain in good faith with the assistance of mediation.
6. Such further and additional relief as counsel may advise at the hearing and the Board sees fit to grant."

3. This request was amended by the Complainant's counsel at the beginning of the hearing. The amendment consisted of five additional requests:

- "1. A notice be posted in the Respondent's plant announcing to all the employees that the Respondent had violated *The Labour Relations Act* and that it undertakes not to in the future.
2. The same notice be mailed to every employee in the bargaining units on the date the Board's decision is rendered and at the Respondent's expense.
3. The Complainant be provided by the Respondent with access to bulletin boards in the plant where notices to employees are commonly posted.
4. The Complainant be provided with access to the Respondent's plant to address, on company time, all employees in the bargaining units who may be in the plant.
5. The Respondent provide the Complainant with a mailing list containing the name and address of every employee in bargaining units the Complainant represents and to keep this list updated until the passage of one year."

4. Counsel for the Respondent took the position that the relief requested was either beyond the Board's jurisdiction or irrelevant to the issues properly before the Board. As a general matter, it took exception to all particulars relating to events more than a year removed from August 9, 1979, the time at which the Complainant commenced a lawful strike against the Respondent. The Complainant, in reply, submitted that the Respondent's most recent conduct during negotiations could be fully understood only in the context of its entire relationship with the Complainant and its supporters from the time the Respondent's employees were first organized. The Board reserved its decision on the actual relevance of the proposed evidence and ruled that it was prepared to admit the evidence on the basis of "arguable relevance".

5. The history of this case is considerable. Radio Shack is a division of Tandy Electronics Limited (Alberta) which in turn is a wholly owned subsidiary of Tandy Corporation, Fort Worth, Texas - a company engaged in the manufacturing and retailing of stereo and other electronic equipment on a worldwide basis. This collective bargaining relationship is very recent in origin. It is also fair to say that its establishment was subject to considerable litigation before this Board and the courts. The present application arises out of the Complainant's attempt to negotiate a first collective agreement with the Respondent.

6. The Complainant relies on all the legal findings in the earlier cases between these parties before the Board on the basis of the doctrine of *res judicata*. It was submitted that direct authority for our power to do so arises out of one of these earlier cases where the Board, in an application for certification by the Complainant under section 7a, relied upon findings of fact and law made in a preceding section 79 complaint before another panel of this Board. The Respondent challenged the propriety of doing so in the Supreme Court of Ontario, and



by a unanimous decision of that Court, the Board's decision was upheld. (See *Tandy Electronics Limited v. United Steelworkers of America and The Ontario Labour Relations Board* (1979), 79 CLLC ¶14,216.

7. The history to this application begins with a decision of the Board dated September 27, 1978, written reasons being issued October 12, 1978 (Board File No. 274-78-U). That decision dealt with complaints under section 79, wherein it was alleged that five employees had been dismissed by the Respondent contrary to sections 56, 58 and 61 of *The Labour Relations Act*. Evidence before that panel, and confirmed by evidence before this panel, established that the complainant's campaign to organize the employees of the Respondent at its Barrie facility formally began in March of 1978. Meetings with employees were held on April 17th, 24th and May 1st of 1978. The employees were terminated on May 3rd. The Board found that two of these employees (Henry North and Stephen Gradon) had been discharged in contravention of *The Labour Relations Act*. Both employees were reinstated into the employ of the respondent with the direction that they be compensated for their monetary losses. Subsequently, the Complainant alleged that the Respondent was in wilful non-compliance of the Board's decision. Explaining that North had found employment elsewhere, the Complainant proceeded only on its non-compliance complaint with respect to Gradon. By decision dated December 4, 1978, [1978] OLRB Rep. Dec. 1128, the Board found that the Respondent had failed to restore Gradon to his previous job as directed and at paragraph 19 of its decision observed:

"In the Board's view Gradon in presenting himself for employment on October 2nd, and in accepting the assignments given him between October 2nd and 18th, and in endeavouring to have his work assignments brought within the terms of the Board's Order, through discussions with his superiors, had acted with mature discretion and had done everything which could be reasonably expected of him to facilitate an implementation of the Board's Order. The Respondent employer, on the other hand, was embarked on a deliberate course of devising work assignments for Gradon such as would isolate him from contacts with other bargaining unit employees, and it is this course which is at the root of the failure to restore Gradon to his previous job."

8. By decision dated November 24, 1978, [1978] OLRB Rep. Nov. 1043, the Board certified the Complainant as the exclusive bargaining agent for a full-time bargaining unit excluding office, sales staff and part-time employees, inter alia, and reserved its decision with respect to a unit of part-time employees, pending the receipt of evidence under section 7a. This decision also reviewed evidence submitted by the Respondent in support of an allegation that membership support had been obtained by intimidation and coercion. The Board concluded that the charges were unfounded. The Board further concluded that it was not satisfied that a statement of desire filed in opposition to the certification application represented a voluntary expression of those employees who signed it and therefore declined to order a representation vote. It held that the Respondent had given its tacit support and approval to the circulation of the anti-union petition on company premises during working hours. Finally, in that same decision, the Board refused a request by the Respondent to inquire into the Form 8 charges filed by the Complainant holding that it had no allegation before it that if proven would support the impeachment of the declarations made in the Form 8.

9. The Respondent applied to the Court for judicial review of the Board's decisions dated November 24, 1978 and December 4, 1978.

10. The application for certification under section 7a for a bargaining unit of part-time employees was granted by the Board in its decision of March 29, 1979, [1979] OLRB Rep. March 248. Certification under section 7a of the Act is directed at those extraordinary situations where employer misconduct has, in the opinion of the Board, eliminated the reliability of any representation vote that might be held. In granting the union's application under this section, the Board relied on the earlier unfair labour practice dismissals; the failure of the Respondent to comply with the Board's order in respect of the employee Gradon; and the Respondent's conduct in relation to the circulation of the anti-union petition. It was also established that, in violation of the Act, a company foreman warned two bargaining unit employees that if the union gained a foothold the company would "move out west", thereby lending substance to rumours to this effect in the plant. The Board also took strong exception to the Respondent's written comment disparaging an examination conducted under the Act into the duties and responsibilities of four employees whose inclusion the bargaining unit the Respondent had challenged. The examination was conducted by a Labour Relations Officer at the direction of the Board as is the Board's practice. At paragraph 25 of its decision the Board wrote:

"There is no question that the company's statement was designed to give the employees a false impression of the Board's procedures and, more importantly for our purposes, to convey to the employees the employer's disrespect for these procedures. It is the Board's view that the statement, which borders on contempt, served to further erode the confidence which employees normally have in the processes established under the Act to guarantee freedom of choice and redress employer violations of the Act. The statement must be considered by the Board in conjunction with the continuing failure of this employer to comply with the Board's order in respect of the reinstatement of Mr. Gradon in deciding whether or not, in the context of this organizing campaign, the true wishes of the part-time employees would likely be ascertained in a secret ballot vote."

Finally, the Board took notice of the Respondent's conduct in distributing bright red "T" shirts embossed on the front with the words, "We're company finks" and on the back with "and proud of it". The Board viewed these actions as "a deliberate and unsophisticated attempt to polarize the workforce..."

11. The Respondent again applied to the Court to have this decision reviewed and this application together with the earlier application pertaining to the Board's "interim" certification of the full-time bargaining unit were dismissed by that Court in its decision of August 8, 1979 referred to above.

12. In accordance with our ruling that the Board would admit evidence relating to the Complainant's organizing campaign, Donald Gallagher was called as a witness by the Complainant. He is now employed by National Grocers, but was employed by the Respondent in the Barrie area as a security officer from March 1977 to September 1978. He and Roy Murden (who until recently occupied the position of Director of Personnel and Security) had



known each other as colleagues in the City of Oakville Police Department, where Murden had been a member of that police department's "drug squad". Gallagher had been very active in undertaking investigations and making arrests in this area of police work and, as a result, came to know Murden. After Murden joined the Respondent he apparently approached Gallagher with a job offer which the latter accepted.

13. Gallagher testified that sometime between Christmas of 1977 and spring of 1978, Murden told him the Complainant was trying "to organize a union with Radio Shack" and that he was going to hire two employees who would infiltrate the union to obtain information on it. Subsequently, Gallagher saw two employees working at the Barrie plant whom he knew had been associated with criminal activity in the Oakville area. Murden told Gallagher not to take notice of them so that he would not "blow their cover". Sometime later he accompanied Murden to the Bar Motel in Barrie where he witnessed a meeting between Murden and these two individuals. Murden advised them that he no longer required their services and paid them in cash then and there. Gallagher thought the two informants had been employed by the Respondent for a total of two weeks, but on cross-examination admitted that they might have been employed for as short a period as a day or two.

14. Gallagher also testified that in the summer of 1978 Murden directed him to photograph the Barrie Y.M.C.A. parking lot and building entrance because the Complainant was convening organizing meetings there. He testified that the purpose of these photographs and diagrams was to give guidance to a private investigation firm whom Murden had retained to take photographs of everyone who attended union meetings.

15. During August of 1978 Gallagher observed a woman working in the Barrie plant whom he knew as Brenda Thom. He said that she had been one of his informants in Oakville and that he approached her at the Barrie plant to confirm her identity. Later, Murden called him to his office and told him to stay away from the woman because he had "nearly blown her cover". Murden told him that she had been hired to infiltrate union meetings and to observe who was organizing the plant.

16. Gallagher testified that he had talked to Murden about the Respondent's labour relations on many occasions and Murden, on one such occasion, advised him that he had been told "by Fort Worth to get rid of the union, no matter what the cost, even if it cost a million dollars". During one of these same conversations, Gallagher asked him "what would happen with the union, with their slim majority" and Murden said, "if they did not have a contract within a year, that they could apply to have the union dissolved". Murden then told Gallagher that the union would not get a contract within a year.

17. Murden asked for Gallagher's resignation in September of 1978 because of an incident unrelated to the union and the events surrounding this case. Gallagher testified that he did not tell the union anything about these matters until about the time of the last Federal election in May of 1979. Counsel for the Respondent cross-examined him extensively on this timing. Gallagher admitted that it was possible he might have told "someone" about these matters as early as September or October of 1978, but he believed his recollection of when he first advised the Complainant was accurate.

18. Frank Berry is a staff representative of the Complainant and was assigned the responsibility for negotiating collective agreements with the Respondent. He has been em-



ployed by the Complainant for thirteen years. He served the Respondent with notice to bargain under section 13 of *The Labour Relations Act* for the full-time bargaining unit on November 30, 1978. By letter dated December 5, 1978 Berry asked the Respondent for certain bargaining unit information so that the Complainant could bargain "from a point of full knowledge of all the conditions involved ...". This letter asked for: (1) a list of all employees in the bargaining unit; (2) each employee's classification; (3) each employee's seniority date; (4) each employee's wage rate; (5) the details of all fringe benefits, Plant holidays, vacations, medical and insurance plans, stock option plans, etc. This Board has sanctioned such requests under the duty to bargain in good faith, ruling that the provision of this kind of information helps to avoid "informational strikes" and facilitates informed discussion at the bargaining table. In the Board's view, providing the exclusive employee bargaining agent with access to this kind of information is basic to an employer's bargaining duty, particularly when the union is a newly certified bargaining agent. The response of the Respondent was to provide the information to the Complainant, but at the same time to disparage the request in a memorandum to all of its employees, dated January 9, 1979. This memorandum reads:

"MEMO TO: ALL HEAD OFFICE EMPLOYEES

REF: LETTERS FROM TRADE UNION

Attached are copies of correspondence the Company has received from the union.

- (a) Letter of November 30, 1978, demand to bargain.
- (b) Letter of December 05, 1978, request of personal information of full time employees.

The Company must supply the information or again be attacked by the union. Up until present your *income*, your *job*, and your *personal employment information* has been confidential. This information now has to be sent to the union so Gaye Lambe can go back on radio, television and the newspaper and *tell all*. The Company is sorry to have to release this previously confidential information, but it has no choice in the matter.

As has been Company policy we will continue to keep you informed.

The Management"

19. The Complainant subsequently sent a copy of the proposed collective agreement to the Respondent to commence bargaining. By memorandum dated January 11, 1979, the Respondent communicated the following information to all of its employees, attaching a copy of the Complainant's initial proposals.

"TO: ALL HEAD OFFICE EMPLOYEES

Well, *here* it is! From the attached letter you will note the Company has received the *demands* of the union.

We are enclosing both the letter received and the *demands*. Note page 3,

article 6 - "6:01 It shall be a condition of employment that all *members must become and remain* members of the respective union in good standing."

Management *bets* they mean *EMPLOYEES* instead of members.

We have told you before and we tell you again – *no one* has to be a union member *TO WORK AT RADIO SHACK – NOW or EVER*.

*No One – NOW or EVER* has to *pay* TO WORK AT RADIO SHACK, read article 6:02.

This is *Canada*. You are *free* to work without paying Gaye Lambe or the United Steelworkers of America any money.

*Again* – if you want to join a union – you are free to. If you do not want to – you do not have to.

You will note we have suggested one of three days to commence collective bargaining with the union at the Holiday Inn at Barrie. Tuesday, 16th of January, 1979, or Wednesday, 17th of January, 1979, or Friday, 19th of January, 1979.

#### The Management"

20. The first negotiation meeting between the parties was held on January 19, 1979 and the Respondent sent another "newsletter" about this meeting bearing the same date to all the employees. The letter reads:

"January 19, 1979

#### TO ALL HEAD OFFICE EMPLOYEES

The first negotiation meeting lasted from 10:00 A.M. to 12:20 P.M. January 19, 1979.

The Union demands were explained and the following revealed:

1. Article 2.01 The demand was to cover part-time employees as well as full time. The Labour Board has not given the Union this right.
2. Article 6.02 The Union dues are now known:
  - (i) For full time employees – 2 hours of your gross earnings per month.
  - (ii) For part-time employees – 1.15% of your gross earnings per month.
  - (iii) Additional "Fees and Assessments" were not explained.
3. Article 17.03(B)

17.03(C) Management said they would never consider these because our housewife programme and part-time employees would have to be discharged.

4. The Union has demanded to include all Truck Drivers – (over 20 drivers) to be included in the Bargaining Unit.
5. The Union refused to take turns to pay for room for negotiations. They claim they have no money.

The next negotiation meeting is be held Friday, February 16, 1979 at 10:00 A.M. at the Department of Labour in Toronto.

#### The Management''

21. After the second meeting, the Respondent sent the following newsletter to all of its employees together with its counterproposal.

“February 16, 1979

#### TO ALL HEAD OFFICE EMPLOYEES

The second negotiation meeting lasted from 10:00 A.M. to 12:20 P.M., in the Holiday Inn at Barrie.

The Company presented the enclosed counterproposal to the Union Bargaining Committee.

In return, the Company received the enclosed monetary demands from the Union. If the direct wage increase were granted it would mean the following percentage changes:

#### *UNION DEMANDS*

Mechanic	Start rate + 8%/Top rate -1%
Maintenance	Start rate + 22%/Top rate + 12%
Maintenance Assistant	Start rate + 41%/Top rate + 29%
Technician #1	Start rate + 5%/Top rate -3%
Technician #2	Start rate + 5%/Top rate -16%
Local Truck Driver	Start rate + 29%/Top rate + 11%
Fork Lift Driver	Start rate + 20%/Top rate + 12%
Shipper/Receiver	Start rate + 31%/Top rate + 19%
Quality Control Inspec.	Start rate + 28%/Top rate + 15%
Order processor	Start rate + 18%/Top rate + 15%
Salvage Clerk	Start rate + 26%/Top rate + 11%
Inventory Clerk	Start rate + 22%/Top rate + 8%
Order Pickers	Start rate + 26%/Top rate + 11%
Order Packers	Start rate + 27%/Top rate + 12%
Cafeteria Workers	Start rate + 31%/Top rate + 16%

Does this make sense to you? Why should some employees get a 41% increase and other employees suffer a 16% decrease?



The above percentage demand does not include the cost of Appendix "A". Our reply to this was simple – we would be prepared to give a fair increase to existing rates. We also stated we could not come close to these demands.

The Union claims *all* employees should get \$12,000.00 per year as anything less is *poverty*.

In addition to all of this –

The Union is now trying to take the shirt off your back. They are claiming the Company should not have given out "T" shirts. They have run to the Labour Board and filed an application against the Company. We will have the hearing to defend this accusation on Tuesday, February 20, 1979 at Toronto.

Management will try and keep the *shirt* on *your* back.  
REMEMBER THE STEELWORKERS JACKETS?

There will be a new supply of "T" shirts available at the Personnel Office on Wednesday, February 21, 1979. These "T" shirts are available to anyone who wishes to have one. (This means *everyone* – even union employees.)

The next meeting to negotiate is scheduled for Monday February 26, 1979 at 6:00 P.M., in the Holiday Inn at Barrie.

As usual, we will keep you advised.

The Management"

22. The Complainant drew the Board's attention to the following provisions in the Respondent's counterproposal:

#### "ARTICLE RELATIONSHIP

.01 The Union shall not by itself, its officers, members or agents, directly or indirectly, intimidate or coerce, or attempt to intimidate or coerce, any employee or employees into membership in the Union or otherwise, or solicit membership in the Union, collect union dues or engage in union activity on company time or during working hours, or hold meetings without the permission on the company premises. Violation by an employee of any of the foregoing shall be deemed just cause for immediate discharge of such employee by the Company.

.02 There shall be no distribution, release or printing, oral or otherwise by the Union, its officers, members or agents, naming or referring by suggestion or innuendo therein the Company or any of its officers, officials or agents, or any of its employees during the term of this agreement without written authorization by the president of the Company prior to any such distribution or release or printing. Any such breach hereof shall from the subject of a grievance and proceed immediately to a Board of Arbitration without first ex-

hausting the grievance procedure. Proof of such breach may be made to the Board of Arbitration by filing of the document transcript or release with the Board.

The decision of the Board shall be as follows:

- (a) an order directing the Union to cease such action and a written public statement withdrawing the earlier release in the same form, and,
- (b) and order the trade union pay as damages to the United Appeal of Barrie a sum of not less than \$5,000.00 and not more than \$10,000.00 for each day following the release, printing or oral statement until such withdrawal is made.

## RULES AND REGULATIONS

### VIOLATIONS:

For violation by any of the following, an employee shall, for the first offence, be warned in writing; for a second offence, suspension of not more than three (3) days; for a third offence, discharge –

- (a) Failure to advise the Company of correct address;
- (b) Failure to identify yourself if requested by a watchman or Company official;
- (c) Failure to be in your department ready for work at starting time and to remain at work until quitting signal is given;
- (d) Failure to care for Company tools and equipment;
- (e) Failure of employee to maintain quality workmanship;
- (f) For spending unnecessary long or repeated periods in rest rooms, at drinking fountains, or in First Aid Room;
- (g) Failure to maintain reasonable production;
- (h) For throwing any articles or engaging in horseplay;
- (i) For eating lunches other than at lunch period or at rest period;
- (j) For loitering in any department or preventing another employee from working;
- (k) For selling any chances or promoting any games of chance or gambling of any kind;
- (l) For failure to observe "Safety Rules and Regulations".

An employee shall be subject to immediate discharge for violation of any of the following:

- (a) Theft of any Company property or any person's property;
- (b) Deliberate damage or waste of Company property;
- (c) Insubordination or failure to follow any instructions of a Supervisor or Company official, except where it may endanger safety;
- (d) Entering the plant in an impaired condition or bringing any intoxicant on the property;
- (e) Giving any false statements or refusing to complete any Company or government forms;
- (f) Fighting on Company property;
- (g) Deliberately punching another person's time card or changing any reading on a time card;
- (h) For smoking in any place where smoking is prohibited;
- (i) Repeated tardiness or absence without permission;
- (j) Walking off the job without permission;
- (k) The distribution of pamphlets, newspapers, or printed material on premises of the Company without first obtaining approval from the Company.

NOTE: It is impossible to list all the situations in which disciplinary action will be necessary, and the above list while no all-inclusive will be changed when necessary by Management.

A change may be effected by sending by registered mail to the office of the Union the change to the rules with the appropriate penalty.

Any alteration, addition or deletion in the aforementioned manner shall have the same effect as it being included in the collective agreement for the purpose of alteration of penalty by a Board of Arbitration. Under the provisions of Section 37(8) of the Labour Relations Act.

Employees are not to enter the premises more than fifteen (15) minutes before starting time and must leave the premises not later than fifteen (15) minutes after official quitting time."

23. By letter dated April 9, 1979, the Complainant served the Respondent with notice to bargain in respect of the Respondent's part-time employees, indicating its hope to include these employees in the negotiations then under way.



24. Berry testified that little or no progress was made in the negotiations until the Respondent retained another lawyer to represent it in bargaining in early June. He testified that the subsequent progress that was made related to the settlement of a great deal of contract language, but that by August of 1979 five outstanding central issues were still on the bargaining table and he believed the Respondent's position on these items was designed to preclude the signing of an agreement. These issues were identified as: (1) a new set of "rules for personal conduct" the respondent wanted incorporated into the collective agreement; (2) a provision permitting the transfer of employees for up to six months without regard to seniority; (3) a wage proposal containing an 83 cent range between the minimum and maximum wage rates for all classifications regardless of the skill content of the classification to be administered by the respondent on the basis of merit; (4) a provision that would permit the fining of the Complainant if it mentioned the Respondent's name without permission (the above reproduced "Relationship" clause); and (5) the Respondent's insistence on the voluntary check-off of union dues (referred to by the parties as "union security").

25. The transfer clause takes the following form:

"A 'temporary transfer' is defined as a transfer of an employee from one classification to another classification or from one department or [sic] another department for a period not to exceed six (6) months. The Company may 'temporarily transfer' an employee without regard to the employee's seniority and without regard to job posting and bidding."

26. By August the article entitled "Rules for Personal Conduct" had been modified to include the following preamble along with the application of a four-step progression of penalties from verbal warning to dismissal for some thirty-nine categories of possible employee misconduct.

"The purpose of the following rules and regulations is to define and protect the rights of all employees and to insure the orderly operation of the plant. Rules For Personal Conduct will be enforced by Management in order to maintain safe working conditions and conduct on Company premises.

The following chart of penalties for violations is intended as a guide under ordinary circumstances. Every effort will be made to administer the penalties with fairness.

The step at which action begins is determined by the rule and is listed along with successive steps for continued violations. Each additional violation calling for the same or lower step results in moving to the next higher step."

27. However, the intended legal result of this provision continued to be the avoidance of review by arbitration of any imposed penalty once the Respondent established the occurrence of misconduct by proper proof.

28. The following job classifications to which the range of wage rates applied was set out in the respondent's first wage proposal made on July 24, 1979, almost eight months after the Complainant delivered its notice to bargain:

# “WAGES

## GENERAL

Description		Grade	Min.	Max.
Cafeteria		1	3.88	4.74
Picker/Packer		2	4.12	4.96
Order Processor –				
Parts	2	4.12	4.96	
Ident. Clerk –				
Parts	2	4.12	4.96	
Picker/Packer Verifer		3	4.37	5.21
Stockhandler				
General		3	4.37	5.21
Co-ordinator –				
Parts	4	4.59	5.44	
Co-ordinator –				
Whse.	4	4.59	5.44	
Stockhandler				
Shipping/Receiving		5	4.84	5.68

## SKILLED

Q.C. Modifer		3	4.37	5.21
Q.C. Inspector, Jr.		3	4.37	5.21
Clerk		5	4.84	5.68
Forklift Operator		6	5.06	5.92
Maintenance		6	5.06	5.92
Q.C. Inspector, Sr.		6	5.06	5.92
Driver – Local Van		7	5.30	6.15
Leadhand		8	5.54	6.39
Assistant Mechanic		9	6.94	7.80
Technician, Jr.		9	6.94	7.80
Driver –				
Shunt	10	7.19	8.04	
Mechanic		11	8.84	9.76
Technician, Sr.		11	8.84	9.76
Drivers – Transport		Not Applicable		

Minimum to maximum six (6) increments – three (3) months, six (6) months, twelve (12) months and annually thereafter. Subject to objective performance evaluation. Drivers – transport to be increased pro-rata.”

29. Also in issue between the parties in August was the Respondent’s insistence on the incorporation of an “Absenteeism and Tardiness” policy into any collective agreement. This policy set out a check list of possible reasons for absence and specified those for which a measure of excessive absenteeism would be applied together with a code of discipline.

30. On the issue of union security Berry testified that by the second or third meeting the Complainant had moved from a “union shop” proposal to a request that all employees in the bargaining unit pay union dues and that those employees who had signed union mem-

bership cards remain as union members. Berry testified that on the issue of “Rules and Regulations” the Complainant took the position that the Respondent had ample authority to promulgate rules of conduct, but the Complainant was opposed to the universal restriction on an arbitrator’s powers of penalty substitution by incorporating such rules into the collective agreement. Berry also testified that the Respondent had never officially relented in its position on the so called “Relationship” clause until the Complainant received the Respondent’s reply to the instant complaint wherein it advised this Board that “the Company, some time before the breakdown of negotiations, had dropped the ‘relationship clause’ ...”.

31. Berry explained that, against the background of this employer’s anti-union conduct, the Respondent’s position on each of the outstanding items made it impossible for the Complainant to do anything other than call a strike. In his view, the Respondent’s voluntary check-off proposal would require union supporters to identify themselves to the company and, once identified, there was the risk that these employees (1) would not receive the discretionary wage increases envisaged by the Respondent’s wage proposal; (2) would be transferred without their consent under the Respondent’s temporary transfer proposal; and (3) would be disciplined under the Respondent’s restrictive personal conduct rules. Signing a collective agreement containing the relationship clause would permit the fining of the union almost “at will” he further testified. By letter dated August 17, 1979 addressed to Bruce Binning, the Respondent’s new counsel, Berry renewed an earlier request offering to submit all outstanding differences to binding arbitration. Binning replied by letter dated August 21, 1979 stating that his law firm did not agree with the arbitration of industrial disputes and that he would not be recommending the offer to his client.

32. At the conclusion of his testimony-in-chief, Berry told the Board that the conduct of the Respondent had completely demoralized the members and supporters of the Complainant and many had now quit the company’s employ.

33. On cross-examination, he admitted that Binning asked him to point out those rules of conduct the Complainant objected to and that he would discuss them with his client. However, Berry insisted that the rules should not appear in the collective agreement. He agreed that there had been negotiating meetings with the Respondent on June 7, 14 and 29; on July 4, 24 and 26; and on August 8, 1979. He also agreed that many things had been agreed to during these meeting (i.e. many pages of contract language). He agreed that the Respondent was willing to allow the denial of merit increases to be the subject matter of a grievance, but said that this was meaningless because an arbitrator would be reluctant to substitute his judgment for management’s. He did not recall the company offering to assume the burden of proof that its decisions were without discrimination, but he agreed that he was not told that the company’s proposal for a merit system was its final position. With respect to the relationship clause, he said that he had never discussed it with Binning. Binning took over the negotiations for the Respondent in early June and Berry said the last time the clause was discussed was in February. He agreed that the union’s proposals of July 24 and July 26 and its special meeting notice of July 31, 1979 made no mention of the relationship clause. He explained that at those times he had forgotten about the clause and may have assumed that the company had dropped the clause. However, in reviewing all outstanding items on August 8th he came across that proposal and realized it had never been officially withdrawn. On August 8th, the parties did not have a face to face negotiating meeting, but as a result of information received that day he honestly believed the issue was still on the bargaining table. On the first day of the strike, and many times subsequently, there had



been reports in the newspaper that the issue was still in contention between the parties and at no time was he advised by the Respondent that the issues was no longer being pursued.

34. Berry agreed that most if not all of the progress in the negotiations was made after the arrival of Bruce Binning and that by August 8th the parties had narrowed their differences to the five outstanding items listed above. He said that many documents had been exchanged on the seniority provision containing the transfer clause with various alterations. He told the Respondent's counsel that the .83¢ spread in wages left too much discretion in the hands of the Respondent's foremen. He said the vast majority of the jobs could be learned in a short period of time and that therefore the spread was much too large. He said it would have been a different matter had the merit increases been only five cents.

35. Berry recalled a meeting in July (probably July 4th) with Binning, Steward Gordon, the Respondent's American lawyer, and Fraser Keene, the mediator of record. Berry indicated at this time that he would be seeking the appointment of a conciliation board and the Respondent's representatives objected. Both Binning and Gordon said they would not be able to get any movement on the outstanding issues until the respondent was facing a strike. Binning added that in the face of a strike both parties might have to change their positions. The meeting adjourned with a "gentlemen's agreement" that Keene would time his recommendation that no conciliation board be appointed to achieve an August 1st strike deadline. Berry also recalled telling Binning that he had yet to demonstrate that the Respondent was interested in achieving a collective agreement and Binning, in a jocular manner, replied that anybody who was not getting his own way could make that statement.

36. The last face to face meeting of the parties was held on July 26, 1979. Gordon asked Berry if both the union security and the rules and regulations issues were strike issues and Berry replied that they were. Berry went on to say that if the union had to strike, it would try to boycott the Respondent's stores across the country. He also told Gordon "if the dues shop fell into place, the others would as well". Keene then arranged a meeting of the parties for August 8th for a last attempt to resolve all outstanding items, but the Board was advised that no face to face meeting took place on that date and a strike commenced the next day.

37. Florence J. Tims, one of the striking employees, testified that Jack MacDonald, a security consultant retained by the Respondent at the outset of the strike, told her and another employee that some employees had retained a lawyer and were doing the work preliminary to an application to the Ontario Labour Relations Board for decertification. The actual filing of the application had to wait until November or December. He further advised them of the percentage of bargaining unit employees who had decided to work in the face of the strike. Finally, he told them that the company only needed "a certain percentage" of the employees to decertify the union. Margaret Russell, another striking employee, testified that some time in September she spoke with Bob Van Nispen, an executive of the Respondent company. He told her that there had been quite a bit of damage caused by people (non-employees) who were supporting the Complainant's picket line and parading on it. He then mentioned the name of Fred Lee, a husband of one of the Respondent's employees, and allegedly said "don't think people don't know where he lives and that things aren't going to start happening to him". The evidence is that a number of people not employed by the Respondent have appeared on the picket line and that vehicles going into the Respondent's facility have been scratched and have sustained tire damage. There is no evidence that any of the damage has been inflicted by the Respondent's employees.

38. Jack MacDonald testified and admitted that he may have talked to some employees on the picket line about decertification. However, he said he would have been merely repeating various rumours he had heard. On cross-examination he said his duties related to the effect of the picket line on the respondent's operations. He admitted that each day he directs the taking of photographs of people on the picket line. This is done as those who wish to enter the plant cross the picket lines in the morning and again in the afternoon as they leave. He said that Murden had arranged for the photography equipment before the strike began and that the pictures have been taken since the outset of the strike. He denied having discussed the issue of decertification with any member of the respondent's management; he denied making reports on the strike activity or having discussions with any executive of the Respondent's "inner circle"; and he denied being familiar with the decertification procedures in the Province of Ontario. He admitted that on a number of occasions since the beginning of the strike he has met socially with the ranking officer of the Barrie Police Department responsible for the proper conduct of the picket line. He said he has known the man for over ten years.

39. Stewart Gordon practices labour law in Columbus, Ohio and has acted for Tandy Corporation in the United States for the past three years. He testified that he became involved in the negotiations of the Respondent on December 15, 1978 on the request of John Roach, Executive Vice-President of Radio Shack in Fort Worth. He said that he met Roach and the American parent's comptroller, John McDaniel, in Toronto on December 20, 1978 and he proceeded to testify about what he was told by these people. Counsel to the Complainant objected to any reliance being placed on this testimony because of its hearsay nature. The Board decided to admit the evidence, but indicated to the Respondent that the complainant's inability to cross-examine Gordon on the hearsay portions of his testimony would undoubtedly affect the weight to be accorded to such evidence.

40. He testified that he was told that management in Fort Worth had only been advised of the Canadian subsidiary's labour problems in December and that this lack of communication was because the Canadian management resented American involvement and had been quite successful from a financial viewpoint. However, on being appraised of the situation, the American parent became concerned and for that reason Roach, McDaniel and Gordon met with the Canadian management and their Ontario labour lawyer on December 20, 1978 to review matters. At the conclusion of that meeting it was decided that Gordon should become involved in the negotiations in an effort to keep the Fort Worth people abreast of events and to ensure that no more unfair labour practices were committed. He said it was apparent that the Canadian subsidiary had alienated itself from the Ontario Labour Relations Board and it was a position the American parent did not want to be in. However, because the Canadian management resented American involvement and because the Ontario labour lawyer, Donald McKillop, Q.C., refused to allow Gordon to sit at the negotiating table as either an observer or spokesman, Gordon commenced his involvement on the basis that he was to be kept advised of events as they unfolded. By May he became concerned with the direction of the negotiations and with the blessing of management at Fort Worth convened a meeting of the Canadian management with its labour lawyer. This meeting was attended by McKillop, Murden, Van Nispin, Gordon and Jerry Colella. The Board was told that Colella had been "brought in from the United States in February of 1979 and made Vice-President and General Manager of the Canadian operation". After this meeting he consulted with McDaniel, Colella, Roach and a Hubert Wynne. Gordon testified it was decided that the Canadian management was not keeping Fort Worth sufficiently abreast of



matters and that Gordon should go to the negotiating table and possibly take on the role of spokesman. McKillop was advised and, according to Gordon, promptly resigned from the case finding these conditions unacceptable. Gordon said he therefore was in need of an Ontario labour lawyer and one who would not “offend the hell out of the Labour Board”. After interviewing a number of lawyers, he decided to retain Bruce Binning. He said he wanted a labour lawyer who would make sure there would be no more unfair labour practices.

41 Negotiations with Gordon and Binning at the table commenced on June 7, 1979. He said that almost twenty-six articles with one hundred and twenty-five sections were outstanding and that after meetings on June 7, 14, 29, July 4, 24 and 26 the outstanding issues had been reduced to three: (1) the absenteeism policy; (2) the incorporation of a set of rules and regulations into the collective agreement; and (3) union dues check-off. Gordon said that he told Berry that the Respondent would modify the absenteeism policy and the personal conduct rules in all areas Berry believed them to be improper, but Berry insisted that neither matter should be included in the contract. Gordon’s position was that a company and union should have a relationship whereby both parties clearly understood the “rules of the road”. He did not want the union coming back on the Respondent disputing the discipline meted out and he wanted the only issue for an arbitration to be whether alleged improper conduct had occurred or not. Gordon said he advised Berry that he believed both parties were in a situation where they were only going to get serious with “their backs up against a deadline”. Berry agreed and with the result that an August 9th strike deadline was set by the union. He said Binning kept the Respondent constantly mindful of its obligations under the Act through June, July and August. He testified that “it was not the company’s intent not to sign a collective agreement”.

42. On cross-examination he testified that he did not become concerned about the direction of the negotiations until May because he had not been kept properly informed. However, he had no knowledge of possible communications between the Fort Worth and Barrie managements throughout that period of time. He said that McKillop had drafted the respondent’s initial proposal and that when he finally saw it he was “disturbed and concerned about several” provisions. As examples of his concern, he referred to the relationship clause and the rules and regulations as they were then drafted. He did not think the rules and regulations were sufficiently clear and he thought the relationship clause was absurd. Gordon did not know who drafted the employee newsletters, but that, to his knowledge, no more were issued after he became involved in the negotiations. Explaining the discontinuance of their issuance he said he thought there was absolutely no reason to issue the newsletters and that he had been advised that they might be unlawful. Gordon also testified that while the American parent requested to have an input into the negotiations at the December 1978 meeting in Ontario; in fact, McKillop drafted the Respondent’s first proposal without any consultation with either Gordon or the executives of the parent corporation.

43. He said that he became involved in the negotiations because the American parent recognized that its subsidiary had violated the legislation in significant ways, but that the Canadian company did not keep him sufficiently informed. For example, in explaining the delay in his concern over the direction of negotiations, he said that no one advised him on March 27, 1979 that the part-time bargaining unit had been certified under section 7a. When asked, he said that to the best of his knowledge there were no other certified bargaining units in the “Tandy empire”, but on re-examination said that he knew of no unfair labour practice findings against his client in the United States for the period he has been associated with the company.



44. On the issue of the relationship clause he said that this provision, in his opinion, had “fallen through the floor boards” and, at the outset of the strike, no longer represented a difference between the parties. On the issue of union dues or check-off, he testified that the Respondent had no “business justification” for its resistance to this proposal of the union. It simply based its position on the belief that the union had never manifested “much support” by the employees. He said that at the time of certification, the Complainant had only one membership card in excess of the fifty-five per cent requirement for outright certification and with “seventy per cent” of the employees now crossing the picket line, the Respondent was confirmed in this view. He denied that the respondent felt a loyalty to the employees who have continued to work during the strike and denied that it had tried to divide the picketers from those who have crossed their lines. However, he acknowledged the following “open letter” published in a very recent publication of the Respondent under the heading “A Debt of Gratitude” and bearing Colella’s signature:

“This section of Watts Up is dedicated to those Radio Shack employees who have demonstrated their courage and fortitude by exercising their right to work in the face of a strike called by a minority of workers.

All Radio Shack sales personnel throughout Canada owe these people an expression of gratitude. Without their loyalty and dedication to their jobs, we would not be experiencing the sales and sales growth that we are enjoying.

Perhaps it is fitting that we should find ourselves in this particular circumstance. It should make everyone who earns their living selling Radio Shack products aware that these people who work in the warehouse are more than “just warehouse workers”. These people are as important and vital to our success in their job as a store manager who produces a \$500,000 store is in his.

All of you out in the field should express your gratitude towards these people. We have said our thanks from here – we would like to hear from you.”

45. Gordon testified that the Respondent’s decisions on the outstanding issues were ultimately made by Jerry Colella. For example, Colella made the decision on union security after Gordon and Binning gave him “the parameters”. The final decision was that because the Complainant had only a bare majority of employees as members, the Respondent would not be moving. On the other hand, the Respondent was willing to do what the law required on this issue and Gordon said its overall position “was not in cement”. He said that Colella never gave instructions that there could be no movement although he did not know who had instructed McKillop. He denied that from June of 1979 the Respondent bargained only with a concern for the Labour Board and with no real desire to achieve a collective agreement. In his view, negotiations reached an impasse on union security and the rules and regulations issues. Berry told him an overall agreement could be achieved if the union could obtain its position on these issues. But Berry refused to make a counter proposal on any of the other outstanding issues until and unless the respondent agreed to compulsory check-off of union dues. Gordon said that the Respondent did not have a chance to conclude negotiations because the Complainant advised that it was not prepared to negotiate further. A strike was called on August 9, 1979.

46. Bruce Binning gave evidence. He said that at the meeting of July 26, Berry advised that “if dues check-off and the rules come off everything else would fall into place”. He said the relationship clause was not an issue in the negotiations after he became involved. He said the parties did not negotiate from the Respondent’s earlier proposals and that he did not refer to that document more than once during the negotiations. He said that his understanding of all outstanding issues was based on the Complainant’s document of July 26, 1979 listing sixteen items, and making no reference to the relationship clause. Binning said he advised the press of this fact after the strike had commenced when a reporter asked him if the clause was still an issue. He said it “was not the company’s intent not to sign a collective agreement”.

47. On cross-examination Binning said that the Rand Formula had been an issue in many collective bargaining disputes; that the Complainant had been involved in similar disputes in the past; and that in such situations, many of the unions, including the Complainant, had signed a contract without Rand. He said the Respondent’s theory behind its position on union security was that a union was only entitled to the Rand Formula where it manifested a high degree of support from employees. The fact that the union had to represent all bargaining unit employees fairly in negotiations was not persuasive. The Respondent made a judgment on the actual degree of employee support by listening to people working throughout the plant. Its foremen, and possibly Murden, gave the negotiators information about these matters.

## SUBMISSIONS OF THE PARTIES

### The Complainant

48. It was submitted generally that the Respondent and its American parent had chosen as a matter of corporate policy: (a) to prevent the formation of a legal bargaining agent at its Barrie operation; (b) to ensure that no collective agreement would ever be signed, following certification; and (c) after being satisfied that it had achieved (a) and (b), to seek to redeem its public reputation with the Board and the community.

49. Under the heading of “Espionage”, the complainant submitted that the retention of informants to infiltrate the union amounted to a violation of sections 56, 58 and 61 of *The Labour Relations Act*. American authority relied on included, *Ohio Power* (1940) 3 LC ¶60,169 (CA-6); *Bethlehem Steel* (1941) 4 LC ¶61,436 (CA-DC); *Atlas Underwear* (1941) 3 LC ¶60,228 (CA-6); *Grower-Shipper* (1941) 4 LC ¶60,609; *Joplin Motel* (1975) 220 NLRB 700 and *Powell Valley* [1975] CCH NLRB ¶19,449. The Complainant also contended that the hiring of private investigators to surveil protected activity under the Act as the Respondent had done was equally prohibited. It submitted that the regular photographing of striking employees, a decision made by the Respondent long before there was any damage on the picket line, was part and parcel of a scheme to coerce and intimidate union supporters.

50. The Complainant asked the Board to have regard to the totality of the facts surrounding this complaint. In particular, it asked us to take account of: (1) the earlier firing of two key in-plant union organizers; (2) the Respondent’s tacit support of the circulation of an anti-union petition in contravention of its own no-solicitation rules; (3) the respondent’s defiance of the Board’s reinstatement of Gradon; (4) the Respondent’s earlier threats to move its plant to Alberta; (5) the respondent’s expressed contempt for the Board’s examination



procedures as described in an earlier decision of the Board; (6) the respondent's hiring of labour spies, private investigators, and two former police officers as a "labour relations consultant" and a "personnel director", respectively; (7) the "moral" crusade and vilification of the union and collective bargaining waged by the Respondent through its newsletters and "T-shirt" give away; (8) the Respondent's predetermined and rigid position on union security; (9) the presentation of "absurd" contract proposals which would, in many instances, give the employees less rights than they had before the arrival of the union; and (10) the continued divide-and-conquer tactics of the Respondent represented by MacDonald's circulation of unfounded rumours about petitions, Van Nispen's threats, and Colellas's tribute to "the right to work" in the Respondent's recent publication of Watt's Up. Authority relied on for the application of the "totality" approach to bargaining complaints included *Electri-Flex Company* [1978-79] CCH NLRB ¶15,224; *Truitt Manufacturing Company* (1956) 30 LC ¶69,932; *Reed and Prince Manufacturing Company* (1951) 96 NLRB 851; *May Aluminum* (1968) 58 LC ¶12,767 (CA-5); and *Maguire Transport Company* (1952) 22 LC ¶67,075.

51. The Complainant submitted that this employer has never recognized the union and this fact distinguished the instant case from *Journal Publishing Co. of Ottawa Ltd.* [1977] OLRB Rep. June 309 where previously the Board said it lacked the power to impose a collective agreement. It was contended that the Respondent has in recent months engaged in a classic exercise of "surface" bargaining – agreeing to many uncontroversial items but resisting on items it knows to be necessary for the signing of a collective agreement. The Complainant directed the Board to a number of earlier decisions condemning sham bargaining as a violation of good faith negotiations. The cases included *The Daily Times* [1978] OLRB Rep. July 604; *The Ottawa Journal* [1977] OLRB Rep. June 309; *Herman Sausage* (1960), 39 LC ¶66,253 (CA-5); *J. P. Stevens* [1978-79] CCH NLRB ¶15,369; *Noranda Metal Industries Limited* [1975] 1 Can. LRBR 145 (BCLRB)

52. The Complainant urged the Board to have regard to the substantive proposals made by the Respondent in evaluating its approach to bargaining and distinguished a number of American cases which appeared to reject this kind of evaluation as turning on the peculiar wording of the American legislation. In this respect the Complainant relied on *Noranda Metal Industries Limited*, *supra*; *Reed and Prince Manufacturing Company*, *supra*; and *Dominion Directory Co. Ltd.*, [1975] 2 Can. LRBR 345 (BCLRB).

53. It was submitted that the Respondent's position on security amounted to taking the benefit in bargaining of a number of earlier and surrounding unfair labour practices designed to prevent employees from supporting the union. Having successfully deterred a large number of employees from supporting the Complainant, it now relied on the resulting lack of employee support in resisting the Complainant's demands on union security. The Complainant submitted that the Respondent's position was entirely circular and unlawful.

54. The Complainant also asserted that the Respondent was now hiding behind its new lawyer. No member of the Respondent's "inner management circle" was called to give evidence and yet it was clear that these were the people who controlled the Respondent's action and were responsible for the earlier unfair labour practices.

55. On the issue of remedies counsel to the Complainant submitted that this case cried out for the most innovative relief the Board could fashion. The claimed relief listed at



the outset of this decision reflects this submission. With respect to the posting and mailing of notices of violations by the Respondent, the Complainant submitted that the flagrant nature of the previous unfair labour practice violations required relief that would assure all employees that there would be no repetition. In addition, the Complainant asked that both itself and all the employees be compensated for their losses as a result of the Respondent's unlawful conduct. These losses were said to include legal costs, organizing expenses, and loss of wages. For authority, the Board's attention was directed to *Academy of Medicine* [1977] OLRB Rep. Dec. 783; *Kidd Brothers Produce Limited* [1976] 2 Can. LRBR 304; *Robinson and Little*, letter decisions of BCLRB dated March 15, 1976 and November 22, 1976. American cases to which the Board was referred, included *H. K. Porter et al* #1 (1967) 56 LC ¶12,332 (CA-DC), #2 (1968) [1968] CCH NLRB ¶20,040, #3 (1969), 60 LC ¶10,043, and #4 (1970) 62 LC ¶10,686; *Ex-Cello Corporation et al* #1 [1970] CCH NLRB ¶22,251, and #2 (1970) 65 LC ¶11,801; *Heck's Inc. et al* #1 [1971] CCH NLRB ¶23,259, #2 (1973), 70 LC ¶13,508 (CA-DC), #3 (1974), 74 LC ¶10,031 (USSC), and #4 [1974-75] CCH NLRB ¶25,529; and *Tidee Products Inc. et al* #1 (1970) 62 LC ¶18,535 (CA-DC), #2 [1972] CCH NLRB ¶23,831, #3 [1972] CCH NLRB ¶23,831, and #4 [1973] 73 LC ¶14,482 (CADC); *Betra Manufacturing Co.* [1978] CCH NLRB ¶18,828; *John Singer Inc.* (1967) 56 LC ¶12,054 cert. denied 56 LC ¶12,341; *J. P. Stevens and Company Inc.* #1 (1967) 56 LC ¶12,054 cert. denied 56 LC ¶12,341, and #2 [1978-79] CCH NLRB ¶15,369.

56. Finally, and in the alternative, the Complainant asked that the Board impose a collective agreement on the parties either by determining the content of such a contract itself or by appointing an arbitrator. It was submitted that only in this way could the situation created by the Respondent's unlawful conduct be rectified. The Complainant urged that the Board find that it has the power to award such extraordinary relief and attempted to distinguish the *H. K. Porter* decision, *supra*, in which the United States Supreme Court held that the National Labour Relations Board lacked such statutory authority.

57. The Board was asked to remain seized of the complaint to deal with the quantum of damages should the Board find monetary relief appropriate.

#### The Respondent

58. Counsel for the Respondent submitted that the Complainant's position makes the assumption that a company cannot change its attitude and approach to collective bargaining once having been found to have violated the Act. In counsel's view, this assumption was entirely inconsistent with the issuance of directions – the standard and workable remedy in duty to bargain cases. A cease-and-desist directive in the nature of a bargaining order assumes that companies are controlled by individuals who will abide by the law once it is made clear that their earlier conduct has violated *The Labour Relations Act*, he submitted.

59. Counsel emphasized that Frank Berry admitted to significant progress in the negotiations once Bruce Binning was inserted; that in the last week of the pre-strike negotiations the parties had narrowed their differences to the rules and regulations including the absenteeism policy, wages, temporary transfers and union security; and that by the strike deadline Frank Berry made it clear that union security was the only real issue between the parties. On the issue of wages he pointed out that the Respondent had offered to permit arbitration on differences over the awarding of merit increases and on the issue of the incorporation of rules and regulations into the collective agreement he asked the Board to note that

the Respondent was willing to review any rule the complainant found objectionable. Counsel further contended that on union security the respondent was willing to abide by the terms of section 36a of the Act which provides for what is known as “voluntary revocable check-off” and it was submitted that in *The Daily Times* [1978] OLRB Rep. July 604 the Board held that such an offer could not be in violation of the Act.

60. The Respondent submitted that all of its actions prior to June of 1979 became irrelevant after it began to amend its initial offer and conduct negotiations in a meaningful way. It was submitted that the Complainant is not a union unable to achieve a collective agreement, but rather the Complainant has, until present, been unable to achieve the agreement it wants. It cannot get a “dues shop”. Counsel asked why the Complainant caused its supporters to go on strike if it thought the Respondent had been bargaining in bad faith. Why did it wait so long to bring forward this unfair labour practice complaint? Counsel submitted that the real explanation was simply that the Complainant thought it could successfully strike on the issue of union security and that it had not done as well in this regard as it had expected. It was contended that the Board could only rely on the substantive proposals of a party in making a finding of bad faith where those proposals were patently unreasonable, a condition which could not be said to exist in the instant case.

61. It was pointed out that the Respondent was never advised that voluntary check-off was unacceptable to the union because it would cause union supporters to identify themselves and that going on strike and engaging in picketing would have this same effect in any event. On the other hand, the Respondent has refused to agree to a Rand Formula because it believes the union lacks sufficient employee support and it is not unusual for a trade union to accept the voluntary revocable check-off of union dues in a first collective agreement.

62. With respect to the remedies requested by the Complainant, the respondent took the position that the requested relief was primarily directed at events that were more than one year old; that the Board lacked jurisdiction to impose a collective agreement and previous decisions of the Board including *De Vilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49 at 66; *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309 at 323 and *The Daily Times*, *supra* at 611 confirmed this view; and that monetary relief was an inappropriate remedy for enforcing the bargaining duty.

## DECISION

63. This case merits a review of a number of basic legal principles together with consideration of their relationship to the bargaining duty. When a trade union is certified as the bargaining agent of employees in an appropriate bargaining unit under section 7 of *The Labour Relations Act*, it has the status of exclusive agent for every one of the employees in the unit so defined. It is with this organization and with this organization alone that the employer must deal once proper notice to bargain has been given. This exclusive nature of the bargaining agent’s role is made clear by sections 35, 41, 42, and 59 of *The Labour Relations Act* and by such well known cases as *John I. Case Co. v NLRB* (1941) 321 U.S. 332; *Le Syndicat Catholique des Employés de Magasins de Quebec Inc. v Le Compagnie Paquet Ltée* (1959), 18 D.L.R. (2d) 346 (S.C.C.); and *General Motors of Canada Ltd. v Brunet and U.A.W.* [1977] 2 S.C.R. 537. This exclusivity accrues despite the fact that a substantial minority of employees in a bargaining unit were opposed to the trade union at the time the certificate was issued. Like in other systems based on the majoritarian principle, the trade



union's role as the exclusive representative can be triggered by a bare majority of employees. However, once a trade union is given this privileged role, it owes an affirmative statutory obligation to represent each and every employee in the bargaining unit fairly and in good faith by virtue of sections 60 and 60a of *The Labour Relations Act*.

64. The legal result of these provisions in the context of bargaining is that once a certificate is issued to a union by this Board, an employer cannot embark on negotiations with a view to rewarding or protecting those employees it believes to have opposed the trade union. Such conduct undermines the exclusive bargaining agent status of the trade union and the minority of employees are amply protected by collective bargaining realities and numerous provisions of the Act. They have the right to participate in the affairs of a trade union (section 3) and their views must be considered by the bargaining agent acting on their behalf (section 60). The collective bargaining reality is that any union representing them will require their co-operation in effecting economic sanctions against an employer if negotiations reach the impasse stage. Indeed, ongoing employee dissatisfaction ultimately can manifest itself in the form of an application for decertification. Thus, while it may be tempting for some employers to conduct bargaining with a view to fostering dissension in a bargaining unit by attempting to protect those employees who initially opposed the trade union, it is improper and in violation of the Act to do so. Such conduct interferes with the rightful choice made by the majority of the employees in the bargaining unit, and simply feeds the anxiety of those employees who, for whatever reason, had earlier doubts about the need for or viability of collective bargaining in their workplace.

65. Bargaining with the obvious view of creating and fostering dissension within a bargaining unit, is also a failure to abide by the requirements of section 14 which obligates trade unions and employers alike to "bargain in good faith and make every reasonable effort to make a collective agreement." On numerous occasions this Board has said that the bargaining duty fortifies the employer's obligation to recognize the duly certified bargaining agent of its employees. See generally *De Vilbiss (Canada) Limited, supra*. This means that employer conduct during the bargaining process aimed at undermining the credibility of a trade union in the eyes of the employees not only violates sections 56, 58, and 61, it will also amount to a failure to negotiate in good faith. Section 14 demands that both parties have the common intention of signing a collective agreement provided that they can reach agreement on its terms.

66. Unfortunately, because of the latter proviso, the application of this legal framework to particular cases can be difficult. The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has as overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See *York Regional Board of Health* (1978), 18 L.A.C. (2d) 255 at 263 (Adams).



67. Thus, from an employee viewpoint the right to engage in collective bargaining is not a right to achieve the terms of employment employees may wish. It is simply an opportunity to combine together to try and achieve their needs with the possibility that economic realities will dictate quite a different result in any particular situation. This perspective of the bargaining duty was explained by the Board in *CCH Canadian Limited* [1974] OLRB Rep. June 375 at page 381 in the following way:

“There was no evidence to suggest that the company’s position on these items was other than “hard bargaining”. There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement “tailored to the company’s measurements”, to use a modified version of Mr. Peacock’s own chosen words, is no reason to conclude that the company was bargaining in bad faith. (see *Regina ex. rel. Hearn v. Norfolk General Hospital* (1957) 119 C.C.C. 290 (Ont. Mag. Ct.)). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest that the company’s terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application.”

68. Of course, difficulties may arise in trying to distinguish those actions of an employer that are properly characterized as “hard bargaining” from conduct designed to destroy the union. And first contract bargaining presents the Board with no greater challenge in this respect.

69. In order to make necessary but sensitive assessments of bargaining conduct the Board must assess the totality of a collective bargaining relationship. For example, the occurrence of flagrant employer unfair labour practices at the same time the parties are engaged in collective bargaining may belie an employer’s claim that a negotiating position is merely hard bargaining with a trade union unwilling to accept its lack of negotiating “clout.” Or patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer’s desire to embarrass the union and encourage its abandonment by the employees. The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of. On the other hand, this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement – a commitment which is more and more self-evident as parties proceed together beyond their first collective bargaining agreement. Too penetrating a review by this Board will only insert it as a third party in the bargaining arena to be tactically used by the negotiations, diverting their attention from the principal task at hand. This is the sense of the note of caution registered by the British Columbia Labour Relations Board in its touchstone *Noranda* case, *supra* at page 160:

“Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:

'There is also danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.'

Accordingly, while we interpret s. 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement."

These principles are of fundamental significance to the facts at hand.

70. We begin by considering the matters attested to by Gallagher. The content of his testimony was quite removed in time from the collective bargaining in June to August of 1979, but we are satisfied that it is relevant and sufficiently timely to be considered in the context of this case. The complaint filed by the Complainant alleges a violation of sections 56, 58, and 61 as well as section 14. Gallagher's testimony goes directly to section 56, 58, and 61 and is relevant to the totality of facts against which the Complainant's section 14 claims must be viewed.

71. Gallagher testified that through Roy Murden the Respondent hired certain persons to infiltrate and obtain information about the union. He testified that Murden hired a private investigation firm to take pictures of persons attending union meetings. He further testified that Murden told him he had been advised by "Fort Worth to get rid of the union no matter the cost." Neither Murden nor any other person employed in the management of either the Respondent or its parent corporation was called to rebut this testimony. Gallagher was cross-examined extensively with respect to the timing of the matters he attested to. While this cross-examination revealed some uncertainty over the issue of timing, we cannot find that the answers obtained from him on cross-examination were anywhere near sufficient to impeach the testimony or to render it so uncertain that this Board should not rely on it. We therefore find that the events to which he testified are factual. We further find that the hiring of the private investigation firm to perform the service it did and the hiring of persons Gallagher knew to be informants to infiltrate and obtain information about the union and its supporters amount to flagrant violations of sections 56, 58, and 61 of *The Labour Relations Act*. These actions, without rebuttal testimony, must be seen as going hand in hand with the termination of two employees and the threat of plant removal which the Board, in earlier proceedings, also found to be in violation of the Act. We have difficulty in imagining conduct that could be in greater conflict with an employer's obligations not to interfere with the selection of a trade union (section 56) and not to intimidate employees exercising their rights under the Act (section 58 and 61). Even if the employees lacked the knowledge that they were being watched and reported on, we are of the opinion that surveillance activity can only have purposes of aiding an employer in "interfering" with the selection of a trade union and in "coercing" and "restraining" employees from engaging in protected activity and, with these purposes, constitutes a *per se* violation of sections 56, 58, and 61 of *The Labour*



*Relations Act. See Grower-Shipper Vegetable Association of Central California, supra* at page 61,807; *Bethlehem Steel Company et al, supra* at page 61,440; *The Atlas Underwear Company, supra*; and *The Ohio Power Company, supra*.

72. We further find that the overt taking of movie pictures or photographs of employees on the picket line at the very commencement of the strike, in the context on this case, had the coercive purpose of intimidating the employees engaged in protected strike and picketing activity against the Respondent. All of the camera equipment was acquired by Murden before the commencement of the strike and the Respondent, through MacDonald, began taking pictures well before any damage had been sustained to vehicles crossing the picket lines. MacDonald did not know why the equipment had been retained so early and Murden was not called as a witness to provide the Board with an explanation. Just when the picture took on the bona fides purpose of being in response to or of deterring improper activity on the picket line we need not determine.

73. MacDonald's interaction with employees on the picket line also gives the Board cause for concern. The Complainant adduced evidence that MacDonald told employees that an application for decertification was being prepared by employees and that they had already retained a lawyer. MacDonald admitted that he may have discussed "rumours" about a decertification application with employees on the picket line. On the evidence before us we are satisfied that he did tell employees on the picket line that a decertification application was being prepared and that this information, being untrue, was conveyed for the purpose of deterring the employees from exercising their right to strike and engage in other union activities protected by the Act. On cross-examination he admitted that he had no firm knowledge about the matters he related to Florence Tims and another employee giving rise to the reasonable inference that he conveyed the information she said he did and that his purpose was to demoralize, confuse and coerce the employees on strike.

74. This brings us to the specific charge that the Respondent has not bargained in good faith and made reasonable efforts to reach an agreement. In discussing the nature of the bargaining duty, we noted the difficulty of distinguishing hard bargaining from conduct which is more in the nature of "going through the motions", and lacking any real intention of signing an agreement – "surface bargaining" if you will. Experience has taught this Board that it must be particularly sensitive to this distinction in first contract situations. Few employers willingly embrace collective bargaining, but most accept the right of the employees to participate in that process and negotiate first agreements with duly certified bargaining agents without rancor or controversy. This, of course, does not mean that all first agreement controversy is a product of anti-union animus or that good faith bargaining in first agreement situations must always end in a contract. Neither proposition would be true. However, the Board and the Legislature of this Province are painfully aware of a number of situations where employers have resisted the organization of their employees by patently unlawful means and the economic dependence of an employee on his employer has been shown to be a very fertile environment for the improper manipulation of employee wishes. Indeed, so delicate is the employment relationship in this respect that the Legislature, in its wisdom, deemed it necessary to enact section 7a, an extraordinary provision which permits the certification of a trade union where, because of improper employer conduct, "the true wishes of employees...are not likely to be ascertained..." Unfortunately, the issuance of a certificate by this Board does not always bring an end to unlawful employer conduct. A trade union is in no more vulnerable a position in many situations then after the issuance of a cer-



tificate, particularly where its organizational campaign has attracted the commission of employer unfair labour practices. Some employers are therefore tempted to continue the controversy over recognition in the knowledge that further delay in negotiating an agreement and the spectre of continued employer hostility will demoralize a sufficient number of employees that no collective agreement will need be signed. Accordingly, in order to effectuate the underlying policies of the Act including section 7a, the Board must be most circumspect in applying the bargaining duty to first agreement negotiations. The Board should not conclude lightly that an employer is merely engaging in hard bargaining in such situations or that it is exercising its freedom of speech in communicating directly with bargaining unit employees. The nuances of each case must be considered and earlier employer unlawful conduct may trigger a detailed assessment of bargaining activity. The legitimate concern for "freedom of contract" or "freedom of speech" ought not to blind the Board to abuses committed under either banner, and that strike at other equally fundamental tenets of the legislation.

75. In the facts at hand, the Respondent commenced bargaining after having dismissed two employees; threatened to move the company out west; given tacit support to an anti-union petition; refused to reinstate an employee at the direction of the Board; and disparaged the Board's normal certification procedures. It also engaged in the other flagrant unfair labour practices established in this case and commented on above. Notice to bargain was given in November of 1978 and meetings began in January. As bargaining commenced the Respondent was distributing T-shirts to its employees that another panel of this Board described as "further polarizing the workforce and further identifying itself as a combatant in the process." Against this background, we then find the Respondent sending a newsletter to all of its employees at the conclusion of each bargaining session and exchange of proposals. The Board has held that parties in first agreement situations ought not to bargain "in the dark" and that an employer is obligated to provide an employee bargaining agent on request with the details of all existing terms and conditions of employment of bargaining unit employees. See *De Vilbis supra*. The failure to provide such information is a failure to make every reasonable effort to make a collective agreement and only perpetuates confusion and distrust at the bargaining table. The Complainant made a request of the Respondent for this kind of information and, while it was eventually provided, the newsletter to employees dated January 9, 1979 ridiculed and disparaged the request. The review of the union's first proposal in its newsletter of January 11, 1979 is in equally intemperate language. These communications, in this particular context, can only be considered as having the purpose of discrediting the Complainant in the eyes of the employees in order to undermine its position as their exclusive bargaining agent. While an employer is entitled to communicate directly with his employees notwithstanding the certification of a trade union, this right must be exercised judiciously and cannot be used to undermine the trade union's bargaining role. Nor, obviously, can it be used for subtle or not so subtle coercion and intimidation of employees. These communications, in our opinion, carried with them a veiled reminder of the Respondent's earlier coercive conduct and evidenced to them that the issuance of the certificate had had no impact on its anti-union attitude. We also find that the contents of these newsletters cannot be justified as attempts either to clarify employee misunderstandings or to persuade employees about the merits of a particular employer proposal. See *B.C. Sugar Refining Co. Ltd.*, July 14, 1978 (unreported). This was also the case in *A. N. Shaw Restoration Ltd. et al* [1978] OLRB Rep. May 393 where at 398-99 the Board had the following to say about the proper approach in employer communications of this kind:

“The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not ‘deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence’. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union’s exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

The question in this case is whether the respondent company’s communications to its employees can be characterized as an attempt to bargain directly with them. The first communication was the letter of February 6th, coming just over two weeks from the first bargaining session. This letter cannot be characterized as an attempt by the employer to explain its bargaining position, nor as an attempt by the employer to set the record straight by clearing up a perceived misunderstanding on the part of the employees. Rather, the respondent company took upon itself to disparage the union’s proposal in no uncertain terms. Even more significant, at the very outset of the negotiations before any real discussions had taken place with the union, the company had indicated to the employees that it would take a rigid position on the referral system, while at the same time raising in the minds of the employees the uncomfortable spectre of a strike. The nature and timing of these remarks raises a serious question of whether the employer was indeed attempting to bargain directly with the employees.”

We therefore find that the Respondent’s direct communications with its employees violated sections 14, 56, 58, 59, and 61 of *The Labour Relations Act*.

76. We are also of the view that the content of the Respondent’s first contract proposal was calculated to impair any progress in the negotiations by inserting the inflammatory relationship clause and the almost equally destructive openended proposal on employee conduct with its related penalties. The Respondent, in its evidence, did not seek to give any rational justification for those two demands and, indeed, Stewart Gordon made his disdain for these proposals clear. This Board must be extremely careful in passing on the contents of



contract proposals for all of the reasons that support free collective bargaining, but it cannot disregard rigid proposals which are obviously calculated to exacerbate conflict and which are fundamentally at odds with the reasonable efforts required of both parties by the bargaining duty.

77. Bargaining over these inflammatory proposals then dragged on until the month of June 1979 with no discernable progress. Stopping at this point, we have no hesitation in concluding that the Respondent from November 1978 until June of 1979 utterly failed in its duty to bargain in good faith and make every reasonable effort to make a collective agreement. We are also of the view that its negotiating conduct during this period was a blatant continuation of its earlier anti-union animus and clearly aimed at further dividing its employees and undermining the trade union's statutory role in violation of sections 56, 58, and 61 of *The Labour Relations Act* and their underpinning principles discussed above.

78. This brings us to the months of June, July and August of 1979 and the Respondent's conduct at that time. There can be no doubt that the parties made "progress" after the insertion of Bruce Binning. A substantial portion of the language that would go into any collective agreement was agreed to between June and August and by the end of July the outstanding central issues had been narrowed to union security, merit wage increases, the transfer clause and the rules and regulations of the Respondent. Gordon testified that he had become dissatisfied with the "direction" of the negotiations by May and in retaining Bruce Binning wished to avoid the commission of any further unfair labour practices. Binning testified that the Respondent's position was not rigid on union security; that it was willing to submit disputed merit increases to arbitration; and that it was willing to review any rule the Complainant thought unreasonable. On the surface all of this evidence appears consistent with the Respondent's claim of a complete "change in heart."

79. So too, some of Berry's evidence is consistent with this theory. After narrowing the issues to four, Berry agreed to the issuance of a no-board report by the Minister apparently to facilitate the mutual need for a strike deadline. This could be said to be a peculiar approach to take with respect to an employer the Complainant thought was bargaining to destroy it. As the strike deadline approached Berry said that if there could be an agreement on union security and the rules, "everything else would fall into place." The union then waited until it was at least three weeks into its strike before commencing this complaint – a timing which might suggest the Complainant simply miscalculated its capacity to strike the employer, its strength having been dissipated by the Respondent's earlier lawless conduct.

80. We have, however, a number of serious misgivings which preclude adopting this view. For one thing, neither Gordon nor Binning had the final say in developing the Respondent's negotiating position. Apparently, Jerry Colella had the ultimate responsibility in this respect and Colella was not called to testify. The evidence indicates that Colella was in control of the Respondent from February of 1979 and, thus, would have been party to the earlier bad faith bargaining which we have found occurred up until at least June of 1979. We further note the recent publication of the letter of "thank you" bearing Colella's picture and signature to those employees who have continued to work during the strike and its resemblance to earlier improper tactics aimed at dividing the employees and undermining the Complainant. By itself the letter could be viewed as no more than an emotional response to a heated strike situation, but the overall conduct of the Respondent makes it difficult for the Board to be confident in characterizing the letter this way. Viewed in the totality of the Re-



spondent's conduct, Colella's "thank you" is more suggestive of an unmitigated desire to destroy the Complainant by fostering employee opposition and belies any apparent change of heart. In the context of this case, the publication also constitutes a violation of section 56 as well as casting light on the proper construction to be given the Respondent's other actions.

81. Apart from Jerry Colella, there has been no significant change in the identity of those people managing the Respondent since the issuance of the certificate for the full-time unit and, yet, no one from the Respondent's management came forward to testify about the underlying basis to the instructions given to Gordon and Binning from June to August in contradistinction to the style of bargaining the Respondent had engaged in before that. Of additional concern is Gallagher's testimony that Murden told him "Fort Worth" wanted to get rid of the union at any cost and that the union would not get a contract within the year following notice to bargain. This testimony was inconsistent with Gordon's evidence that the American parent had been kept in the dark. Indeed, the insertion of Colella by the American parent in February of 1979 is inconsistent with Gordon's view of the Respondent as an independent Canadian subsidiary which was keeping its parent and its advisor in the dark. We are also concerned that neither Murden nor anyone associated with the parent came forward to rebut Gallagher's testimony or to explain to the Board firsthand that such deep-seated attitudes no longer permeated the Respondent's actions. Gordon explained his understanding of the change in attitude, but he is not an officer of either the American parent or the Respondent and his evidence about the change in attitude was, by and large, hearsay. Furthermore, he had no direct knowledge of any communication links between the Respondent and its parent and the role the parent was playing, if any, in the negotiations. Berry dealt exclusively with Gordon and Binning and even in the eleventh hour of the negotiations he doubted the sincerity of the Respondent. With the insertion of a new face in the negotiations, it is not surprising that the union delayed bringing this complaint and instead made a serious effort to test and judge the Respondent's apparent change in heart. That the Complainant called a strike before launching this complaint is not irrelevant to the issues before us but may only reflect its stated uncertainty over the Respondent's true intentions. After hard reflection on this issue, we have come to the conclusion that any ambivalence it may have had over the actual intentions of the Respondent was not unreasonable in the circumstances and ought not to deprive it from asking this Board to make its own judgment about the Respondent's sincerity in light of all the evidence.

82. In making our assessment, the absence of direct testimony from company officials is of great significance because of the rigid positions taken by the Respondent on the central issues in the negotiations. There can be little doubt that its positions on wages, transfer, union security and rules of conduct cut to the very heart of a collective agreement. That they would be strike issues with the Complainant in the context of this dispute is hardly surprising. That the Complainant would see an anti-union animus connecting the Respondent's position on each of these issues is also not unreasonable given the history to this relationship. Against the background of the Respondent's earlier misconduct, this Board is entitled to a detailed explanation justifying the Respondent's position on each item in order to be satisfied that the positions were not taken for the purpose of provoking the Complainant into an untenable strike.

83. To be fair to Bruce Binning and Stewart Gordon, they tried to give a rationale for some of the positions taken, but it was clear that they were merely giving their personal in-

terpretations of what they thought the Respondent's intent was. The fact that they told Berry a strike deadline might affect the Respondent's resolve is demonstrative of their limited direct knowledge of the Respondent's motives.

84. The absence of direct testimony on motivation is of particular importance on the issue of union security because the Respondent's position on this issue fits hand in glove with the entire pattern of earlier unlawful conduct aimed at fostering employee opposition to the Complainant to undermine its status as exclusive bargaining agent for all of the employees in the bargaining unit. Binning testified that the Respondent's position was not rigid on this issue, but saying this does not make it so. The rigidity in a party's position must be gleaned as much from its conduct as from what it says to this Board. While we have no doubt that Bruce Binning thought his client might react differently in the face of a strike, the fact is that it did not. It is also a fact that Colella was the decision maker and he did not come forward to provide the Board with his understanding of the Respondent's current position on this issue and to explain how it differs from the Respondent's intemperate declaration on union security published in its January 11, 1979 newsletter. Nor was he called to explain how his "thank you" note to employees not honouring the picket lines related to the Respondent's earlier improper tactics aimed at discouraging support for the Complainant. From the Respondent's bargaining conduct one can detect no change on the union security issue from the period during which its actions were rife with anti-union animus to the more recent period where it claims to have engaged in hard bargaining. Furthermore, we have difficulty with Bruce Binning's explanation that the Respondent's position on union security is simply an unwillingness to agree to a Rand Formula where the union lacks a very large degree of employee support. Where the employer adopting this position has played no significant role in unlawfully contributing to the absence of such support, the position is unobjectionable. Such a difference in principle is not foreign to collective bargaining and cannot, by itself, be considered a product of bad faith bargaining. See *The Daily Times*, *supra* page 610. But where an employer adopts this stance after having engaged in the kind of pervasive unlawful conduct that the Respondent has engaged in, the underlined caveat in the following excerpt from *The Daily Times* leaps out from the rest of the paragraph which the Respondent asked the Board to take note of:

"The union claims that the company has coupled its wage offer with an offer of union security which it knows the union cannot accept and which, therefore, is designed to make it impossible to conclude an agreement. Section 36(a) of the Act provides that on written request of the trade union there shall be included in the collective agreement a clause providing for voluntary revocable check-off. An offer of the form of union security provided for in Section 36(a) of the Act cannot be in violation of the Act. *This is not to say that an intrasigent offer of this form of union security coupled with other relevant facts might not cause the Board to conclude in a given case that an employer had failed to bargain in good faith.* Even if the Board were to make such a finding, however, it could not impose a form of security different than that set-out in section 36(a) of the Act. If the Board was to make an order of the type sought by the trade union in this case, it would be ignoring the policy of voluntarism which is embodied in the Act and, having regard to the provisions of Section 36(a), it would be thrusting itself into the role of legislator; a role which it cannot assume." [emphasis added]



85. It is not unusual for the ranks of a union to be swelled by bargaining unit employees after the issuance of a certificate. In fact, Bruce Binning made this point during his testimony. Employees who have been noncommittal may subsequently support the union once it has been certified by the Board. And this is true even for those employees who may have opposed the union prior to certification. But the Respondent did not refrain from the commission of unfair labour practices in November of 1978 after the issuance of the full-time bargaining unit certificate and did not commence to bargain in good faith. For the Respondent to then base its position on union security on an absence of employee support in August of 1979 tends to taint its motivation on this issue with its earlier unlawful conduct. Without persuasive evidence to the contrary, there is no reason for not concluding that the Respondent's rigid position on union security continues to be part and parcel of a longstanding scheme to undermine the statutory role of the Complainant as exclusive bargaining agent.

86. In coming to this conclusion we are particularly sensitive to the nature of section 36a, the benefit of which a trade union is entitled to as a matter of right and which is all the Respondent has ever been prepared to offer. Section 36a requires an employee to come forward and advise his employer that he wishes union dues to be deducted from his wages. Where an employer has acted as the Respondent has and over so long a period of time, it may require a particularly courageous employee to make such a request. Therefore, when this same employer rigidly ties his position to voluntary revocable check-off, his conduct is open to the inference that he is motivated by a desire to deter his employees from supporting the union in this manner. The Respondent has, in the circumstances, failed to adduce sufficiently cogent evidence to rebut this inference. It is simply wrong to conclude that offering what the statute requires as a bare minimum in the area of union security cannot be held to constitute bargaining in bad faith. Standing alone this may be the case. But when considered in the light of other employer actions, it can be one of the most coercive elements of a scheme to discourage and undermine trade union support. Surely the Legislature did not intend to preclude the Board from so finding. We therefore find that the Respondent's position on union security violates sections 14, 56, 58, and 61 of *The Labour Relations Act*. As for counsel's argument that employees have to identify themselves when they go on strike in any event, this submission does not respond to the coercive significance of section 36a to non-member employees and, if the Respondent's own assessment of strike support is accurate, it may be telling that fewer employees than originally supported the Complainant's application for certification are now on strike. In fact, we find it quite remarkable that the Respondent could seriously rely on the "intelligence" about union support gathered by supervisors in developing its position on union security. With the history to this complaint, an employee would have to consider the wisdom of admitting support for the Complainant to the Respondent's supervisors and, as a Board, we are concerned that the Respondent is even monitoring employee sentiment in this respect in these circumstances.

87. To the extent that absolute rigidness is inconsistent with good faith bargaining and reasonable effort, it should be clear from our reasoning above that we are of the view that an employer can be no more rigid and unbending on union security than he can be on any other issue. Section 36a simply provides the union with a very limited form of union security as a matter of right. Any other form of union security is still clearly negotiable and, thus, an employer's bargaining obligation remains unchanged. Indeed, the very fact that the Legislature thought it necessary to enact section 36a conveys a statutory recognition of how important this issue is to trade unions and the problems associated with employer opposition. It would therefore be strange for this Board to interpret the presence of a provision benefiting trade



unions to some limited degree in a manner which would encourage employer resistance and thereby exacerbate collective bargaining conflict in relation to this very sensitive issue. The issue is easily manipulated by an employer intent on undermining the exclusive role of a certified bargaining agent arising as it does in first agreement controversies. The Board must therefore judge bargaining with this fact clearly in mind.

88. After the long period of bargaining in bad faith that has been established in this case (together with the other unfair labour practices committed by the Respondent), there is an onus to prove the alleged change of heart in the latter stages of negotiations with the most cogent evidence available. This must be so because of the labour relations reality that apparent changes in heart may be little more than an awareness that “hard bargaining” is now sufficient to preclude the execution of any agreement or to cause so unsatisfactory a contract that continued employee support of the Complainant will be impossible. Neither of these approaches to “hard bargaining” is permissible and the Respondent is in the best position to explain its motivation in adopting the bargaining postures that it has.

89. After carefully analyzing all of the evidence, we have also come, on balance, to the more general conclusion that the Respondent was not bargaining in good faith and making every reasonable effort to enter into a collective agreement from June to August. This is not to deny that “progress” was made in negotiating the language of a possible agreement. But we think it more likely than not that the Respondent’s rigid position on union security, as well as other items central to the negotiations, had the purpose of avoiding a collective agreement and was part and parcel of its earlier conduct aimed at undermining the trade union in the eyes of the employees in order to foster its early demise. This conclusion relies heavily on the totality of the evidence, arising as it does in a first agreement context, and draws its conceptual support from the following description of “surface bargaining” found in *The Daily Times*, *supra* at para. 15.

“ ‘Surface bargaining’ , is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between ‘surface bargaining’ and hard bargaining. The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even ‘predictably unacceptable’ is not sufficient, standing alone, to allow the Board to draw an inference of ‘surface bargaining’ . This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of ‘surface’ bargaining can be made.”

We therefore find that the Respondent’s more general bargaining posture during the months of June to August was in violation of sections 14, 56, 68, and 61 of *The Labour Relations Act*.

90. These findings bring us to the issue of remedy. What remedies are available to the Board and appropriate in this case? The Complainant has asked for a declaration, a posting of notices, access to employees and their addresses, damages, the imposition of a collective agreement and, as an alternative to the imposition of an agreement, a bargaining order. In requesting these remedies, the Complainant raised some fundamental concerns over the effectiveness of the Board's bargaining order as an almost exclusive remedy in respect of breaches of section 14. On the other hand, the Respondent took the position that the Board lacked the jurisdiction to impose an agreement and argued that much of the earlier conduct complained of was irrelevant to any matter now before the Board.

91. Section 79(4) is the section of the Act under which remedies of the kind relevant to this case are made. Its very open-ended wording presents this Board with both the greatest opportunity to fashion carefully tailored effective remedies and the greatest temptation to exceed proper statutory bounds. The Solomonic difficulty in applying the broad powers granted to the Board under this section are apparent from the words used.

"79(4) ... where the Board is satisfied that an employer, ... has acted contrary to this Act it shall determine what, if anything, the employer, ... shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, any one or more of,

- (a) an order directing the employer, ... to cease doing the act or acts complained of;
- (b) an order directing the employer, ... to rectify the act or acts complained of; or
- (c) an order ... to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, ..."

92. Guidance, however, can be gained from a number of first principles that are apparent from the structure of the legislation and that have evolved through experience with the section. Moreover, because of the breadth of the requested relief in the instant case and because one such principle has been severely challenged by the Complainant, the Board has decided to review its approach to unfair labour practice remedies and to explain more fully its role in these matters.

93. It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means



then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labor Board Remedies* (1968), 14 Wayne L. Rev 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations, three basic principles that underpin section 79 have emerged.

#### (1) A Remedy is Not A Penalty

94. If deterrence was all that the Board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating *The Labour Relations Act*. But the Legislature did not provide the Board with this role and probably with good reason. See *Little Bos. (Weston) Limited* [1975] OLRB Rep. Jan. 83, at 91. Section 85 of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 5, 423(2)(a); *Re Regina v Gralewicz et al* (1979), 45 C.C.C. (2d) 188 (Ont. C.A.) By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. If it were otherwise, the Board's accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea bargaining in the criminal law context. Labour law has historically been more interested in accommodation than "two-fisted" enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court's contempt jurisdiction.

95. In the immediate case this principle has importance. For example, affirmative orders that an employer post notices indicating that he has violated the Act and directives that he publicly commit himself to future compliance with the legislation cannot have as their purpose public humiliation, embarrassment and, thereby, punishment. These remedies may be appropriate as might direct trade union access both to employees on an employer's time and to employee addresses, but only as directives aimed at the removal or rectification (to use the language of the statute) of the consequences of a violation. These types of remedies, and their nature is almost infinite, should have as their purpose the amelioration of the



lingering psychic effects of unfair labour practices and the consequent injury to a union's organizational or bargaining strength. The jurisprudence developed by the National Labour Relations Board is replete with other examples and demonstrates the great potential for developing affirmative labour relations remedies under Section 79. See McDowell and Huhn, *NLRB Remedies for Unfair Labour Practices*, Wharton School of Finance, Univ. of Pa. (1976). However, the Board must consider the appropriateness of each remedy in a Canadian context and in the light of our own statutory framework. For example, *quare* the application of certification extension in Ontario: *Mar-Jac Poultry* (1962) 136 NLRB 785.

## (2) Monetary Relief is Compensatory

96. This is a corollary to the no-punishment principle. While it may be discouraging to the Board where, for example, the reinstatement of an employee with back pay, is simply inadequate to deter repeated offences, this is no justification for the application of additional monetary penalties in the guise of compensation. Thus, it is conceivable that the Board might change its policy and no longer require the mitigation of losses by employees who are subject to an unfair labour practice discharge. The change might be justified by the argument that the employer is paying no more than he would have had to pay had the person been employed up to the date of his reinstatement. However, it would be clear to those who regularly appear before the Board that our primary purpose was more in the vein of making unfair labour practice compensation orders more painful. On the other hand, our back-pay and compensation awards should be as fully compensatory as possible and, on request, could bear interest. Our approach might be analogous to that provided for by *The Judicature Act*, R.S.O. 1970, c. 228, as amended S.O. 1977 c. 51, s. 38. See also *Sedgewick and Metropolitan Toronto Zoological Society* (1979), 22 O.R. (2d) 225.

97. An order directing compensation for loss of earnings is not the only manner of awarding monetary relief under section 79. The language of section 79 provides the Board with the broadest power to provide relief with paragraph (a), (b) and (c) of section 79(4) being but illustrations of this broad power. This is made clear from the general direction of the section stating that the board "shall determine what, if anything, [a party] shall do or refrain from doing with respect thereto" and from the subsequent introductory phrase to the specific powers "without limiting the generality of the foregoing . . ." An additional and important justification for concluding that the Board has power to award, in effect, general damages arising from a breach of the Act was well expressed in *The Journal Publishing Company of Ottawa Limited*, *supra* at para. 61, thusly:

"The language of section 79(4)(c) is intended to clear up any doubts about the Board's power to reinstate employees, a remedy not available at common law, and not to restrict the awarding of damages to this one situation. The power of an arbitrator to award damages in the absence of express statutory authority has had longstanding approval from the Supreme Court of Canada. See: *Polymer Corp.* (1962), 33 D.L.R. (2d) 124. It would be strange indeed if the Labour Board did not have at least equal remedial authority, where the language of the legislation so clearly provides for it."

98. The power was exercised in *De Vilbiss (Canada) Limited*, *supra* where the Board directed the payment of certain allowances and holiday pay that had been denied the union's negotiating committee members as part of the scheme to subvert bargaining. More recently,

we have seen the power characterized as permitting “make whole” remedies, a term popularized before the National Labour Relations Board and U.S. courts, but amounting to no more than broad compensatory relief in respect of flagrant unfair labour practices. Such relief has included a trade union’s organizing costs or extraordinary organizing costs, depending on the circumstances. It has also included all wasted negotiating costs and necessarily incurred legal costs caused by the commission of unfair labour practices. For example, in the *Academy of Medicine, Toronto Call Answering Service*, *supra* an employer closed part of his business in response to the certification of a trade union to bargain on behalf of its employees. In awarding the union all “reasonable organizational, bargaining, legal and other expenses” and the affected employees some three months of wages, the Board articulated the following compensatory rationale:

“The Board, having regard to the seriousness of the respondent’s unfair practices, to the impracticality of making order for rectification, and to the fact that the employer is continuing in operation other aspects of its enterprise, has concluded that this case is an appropriate one for the granting of a ‘make whole’ order. The Board orders the respondent to reimburse the union for all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights. Such expenses are to include the costs of proceedings before the Board, proceedings which would not have been necessary but for the unfair practices of the respondent. While this part of our order is equivalent to an award of costs, it should not be taken as signaling a retreat from the Board’s general practice of not awarding costs as against an unsuccessful party. This is a case, however, where the employer’s contraventions of the Act are so serious that the resulting legal costs to the union cannot be ignored. Moreover, the rationale underlying the Board’s practice of not awarding costs – that of not identifying a ‘winner’ and a ‘loser’ – is of no application where, as here, the conduct of the employer has made it impossible for the parties to live together in the future. (See *Repac Construction and Material Limited*, [1976] OLRB Rep. Oct. 610.) It should be stated, however, that the Board has not attempted in this decision to exercise any general procedural power to award costs. What the Board has done is exercise its remedial authority under section 79(4)(c) of the Act so as to, as nearly as possible, restore the union to the position it was in prior to the respondent’s unfair practices. Given the impracticality of an order for rectification, full compensation, including all reasonable legal expenses, ought to be awarded to the union.

Compensation must also be considered for the discharged employees. What the employees have lost is their employment status. This status has been lost by reason of the illegal closure of their place of employment. As stated, employees in this Province do not run the risk that their employer will close down simply because it is unwilling in principle to operate with a union. The Labour Relations Act contemplates the continued status of strikers as employees and provides employees on a lawful strike with a right to be reinstated in their former positions upon the making of an unconditional application to return to work, within six months. While no such applications were made in the instant case, the Board finds that, because the respondent had by June 9th permanently discontinued its Call Answering Service, applica-



tions for reinstatement by the employees would have been fruitless and were therefore unnecessary.

Damages resulting from a loss of employment status cannot, of course, be measured with precision. However, since the uncertainty of the measurement is directly attributable to the aggravated character of the violation, the employer should not be able to avoid an assessment on that ground. The Board must make its best estimate of the value of the employee's loss in all the circumstances of the case.

To compensate the employees of the Call Answering Service for the loss of their employment status, the Board has determined that the respondent should pay to each of the employees listed on Schedule "A" [deleted] a sum of money equivalent to the amount they would have earned from June 9, 1977 – the date of the closure – until September 9, 1977, such compensation to be computed on the basis of the employees' respective wage rates as of June 9th. This assessment, which is designed to afford the employees a reasonable period in which to secure alternate employment without loss of income, is based on the assumption that the respondent would not have discontinued its Call Answering Service Division for cause within the foreseeable future. The evidence is that the respondent had operated its Call Answering Service for forty years, and that the service was an expanding one. It must, therefore, be assumed that the Call Answering Service would have continued had not the employees chosen to exercise their rights under the Act to join a trade union and to participate in its lawful activities. To ensure that no employee receives a windfall as a result of the employer's unfair practices, those employees finding alternative employment during the period in question, and the evidence indicates that there are some, will have their damages reduced accordingly."

Other Canadian examples can be found in *Kidd Bros.*, *supra* and the *Robinson and Little case*, *supra* both decisions of the British Columbia Labour Relations Board.

99. However, the Board has held that there are clear limitations to its power to award general damages. In *The Ottawa Journal* case the Board was requested to impose "the contractual terms that [the parties] would have been expected to reach had there been good faith bargaining, ... [and] damages to the employees for loss of wages and other employment benefits from the time of [a] lockout" such damages to reflect the collective agreement that would have been in place. The Board held it was without jurisdiction to impose an agreement and went on to decline to award the damages requested because of a concern that an award of damages should not result in the indirect imposition of a collective agreement and the belief that there should be no compensation for damage resulting from the use of legal economic sanctions. Its reasoning is found at paragraph 61 of the decision.

"The existence of the power to award damages does not necessarily mean that such relief is appropriate. Although we do not agree with the employer's argument that damages are never an appropriate method of remedying a failure to bargain in good faith, we recognize that this type of remedy must be imposed with care. There are two concerns of particular importance.



First, the awarding of damages should not result in the indirect imposition of a collective agreement. In this case, therefore, it would be inappropriate to award damages for loss of wages suffered as the result of the lock-out, since this approach would require the Board to determine terms and conditions of employment for those employees during that period. Second, the Board should not compensate for damage that results from the use of legal economic sanctions. The problem, in this case, is that the lost wages and employment benefits flow from the lock-out – an action that was timely, and not prohibited by the *Labour Relations Act*. The mere existence of an element of bad faith bargaining cannot convert an otherwise legal strike or lock-out into an illegal act, that would give rise to extensive liability in damages. The wrong lies with the manner in which the negotiations are conducted, not with the use of the economic sanction. To hold otherwise would introduce into the strike and lock-out an element of uncertainty that would disrupt the process of labour relations as it now exists in Ontario. In this case, although it is clear that the lock-out was not connected initially with any failure to bargain in good faith on the part of the employer, it could be argued that the employer's later failures to bargain in good faith subsequently tainted the lock-out. We do not accept this argument. The lock-out continued to be legal and damages, if any, must relate to extra negotiating costs that might have been caused by the employer's conduct, and not to the economic losses resulting from the lock-out itself."

100. After reviewing these policy pronouncements, we have decided that some qualification is demanded by our experience and by a need to ensure our remedies remain effective. While we admit that monetary relief based on the collective agreement that would have been negotiated had there been good faith bargaining requires the assumption that an agreement would have resulted, awarding no monetary relief is tantamount to assuming no agreement would have arisen out of good faith bargaining. Clearly, reality is usually somewhere in between in the sense that either proposition may be valid in any particular case. What trade unions like the Complainant and the employees it represents lose in cases of this kind is "the loss of an opportunity" to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time. Employees join a trade union with, in their minds at least, the reasonable prospect of obtaining an improvement in their working conditions. In fact, the Complainant may be able to statistically document the reasonableness of such employee expectations. When an employer responds with flagrant unfair labour practices, he wrongly prevents his employees from realizing their expectations or delays having to deal with any of their demands. For example, an employer may be able to escape with no contract at all if the initial organizing strength of the union can be so eroded by unfair labour practices that a strike can be outlasted. Moreover, the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers. In labour relations terms these employee losses are real; the potential employer gains unjust; and both are accomplished by the violation of a fundamental duty imposed by the legislation – bargaining agent recognition. The failure to consider any monetary relief seems to encourage these consequences. See generally: Note, *An Assessment of the Proposed Make Whole Remedy in Refusal to Bargain Cases* (1968), 67 Mich. L. Rev. 374; Note, *An Analysis of The NLRB Objections To a Make Whole Remedy in Refusal to Bargain Cases* (1971), 3 Rutgers-Camden L.J. 272.

101. It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature – a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See *Mayne and McGregor on Damages* 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536; *Roach v. Yates*, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

102. *Chaplin v. Hicks*, [1911] 2 K.B. 786 (CA) first recognized the principle of compensating for the loss of an opportunity in the context of a beauty contest. The case involved a breach of contract to enter a contest from which the loss of opportunity to win a prize flowed. In determining whether the breach of contract resulted in injury to the plaintiff, Lord Justice Fletcher Moulton, at 795 commented:

“Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury and the damages given in respect of it should be equivalent to the loss.”

103. A similar situation arose in *Domine v. Grimsdall*, [1937] 2 All E.R. 119 where a plaintiff recovered £15 from a defendant bailiff who had improperly failed to execute judgment against a debtor of the plaintiff, the loss of chance being that the debtor would pay off his debt to avoid the execution against his goods.

104. In *Hall v. Meyrick*, [1957] 2 Q.B. 455 a solicitor negligently failed to warn the plaintiff that her marriage would revoke a will made in her favour by her intended husband. The damage she suffered as a result of this negligence was the loss of opportunity to secure the benefits of a new will. However, in valuing the opportunity Ashworth, J. at 471 noted that, “[T]he more the contingencies the lower the value of the chance or opportunity of which the plaintiff was deprived.” The damages awarded were £1250.

105. The Supreme Court of Canada approved this principle in *Kinkel et al. v. Hyman et al.*, [1939] 4 D.L.R. 1. where the defendant directors had sold the plaintiff’s stock in a company without obtaining the consent of 51% of the shareholders for whom it was held in trust. The plaintiff had resold stock to the defendants for an option to repurchase provided that the defendant directors called a meeting of the shareholders to ratify the first transaction. The defendants failed to call a meeting within the life of the option. The court found a breach of contract, but awarded only nominal damages as there was no proof that the shareholders would have ratified. At page 7 Mister Justice Crockett observed:

“For my part I can find no authority in either *Chaplin v. Hicks* or *Carson v. Willits* justifying any Court in awarding any more than a nominal sum as

damages for the loss of a mere chance of possible benefit *except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.*" [Emphasis added]

106. In the B.C. Supreme Court case of *Hornak v. Paterson et al* (1967), 62 D.L.R. (2d) 290, the plaintiff established a breach of contract by the defendant union in failing to notify him of an employment opportunity. Damages were awarded for the lost wages of the particular job in question but were not awarded for the loss of opportunity for future employment, again because of lack of proof of the opportunity materializing. In discussing the onus of proof Mister Justice Aikins, at 298, had this to say:

"In my view before damages may be awarded for the loss of a chance the existence of the chance said to have been lost must be established in accordance with the usual requirement in a civil case, that is on the balance of probabilities. The proof is insufficient if it is left as a matter of conjecture whether there was a loss of a chance or not. This simply means that there must be acceptable evidence showing directly that there was the chance claimed or leading to the same conclusion by reasonable inference."

107. *McWhirter v. University of Alberta* (1978), 7 A.R. 376; 80 D.L.R. (3d) 609 is another and very recent case involving this issue. A professor alleged that the University had failed to follow certification procedures set out in the University of Alberta Faculty Handbook when considering him for tenure. As a result, he lost the chance to be considered the following year for tenure. The Court assessed damages for breach of contract at \$12,000 which reflected the chance of success in the new hearing and the likelihood he would have been accepted and have remained at the University in any event.

108. American cases have also adopted this principle. In *Kansas City, M. & O.R. Co. v. Bell*, 197 S.W. 322, the defendant delayed a shipment of pedigree hogs in breach of contract. The plaintiff recovered as damages the value of the chance to win the amount of the price he claimed he would have won at the stock show in which he missed entering his pigs. Boyce, J. discusses how the chance would be valued:

"Evidence as to all such matters as would tend to show the probability that the plaintiff would be successful in the competition would be admissible, and, as one of the judges in the English case says, it would then be left to the good sense of the jury trying the case to determine the value of the plaintiff's chance on the competition."

109. Similarly in *Wactel v. National Alfalfa Journal Co.*, 176 N.W. 801, a contestant in a magazine subscription contest recovered the value of the chance to win where the defendant wrongfully declared the contest abandoned in the plaintiff's district.

110. More recent cases valuing the losses sustained in the breach of vacation contracts are further examples of the willingness of the courts to provide effective relief for the violation of private rights. See *Jarvis v. Swans Tours Ltd.* [1973] 1 All E.R. 71 (C.A.).

111. If the courts have not shied away from attempting to provide effective monetary



relief for the violation of private rights, should the Ontario Labour Relations Board be any less sensitive when confronted with the intentional defiance of statutory policy? The answer must surely be in the negative unless this approach conflicts fundamentally with more important principles and we do not think this is the case.

112. A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular collective agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade union's bargaining capacity in negotiations which have been impaired by the employer's wrongful acts and refusal to engage in collective bargaining. It is therefore this "loss" – the bargaining expectancy – that must be assessed. Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties, it would not seem rash to think that reasoned argument can be made on this issue too. Indeed, at least one American statute specifically provides for such an approach. See *California Labor Relations Act of 1975*, incorporated as Part 3.5 (sections 1.40 to 1166.3) of Division II of the California Labor Code. Also see Yates, *The "Make Whole" Remedy for Employer Refusal to Bargain: Early Experience Under the California Agricultural Labor Relations Act* (1978) 29 Lab. L.J. 666.

113. The first case decided under that statute was *Adam Dairy* (1978), 4 ALRB 24 which set out the California Agriculture Labor Relations Board's approach to estimating bargaining loss in the following excerpt:

"By contrast, legislation now pending before Congress to add the make-whole remedy to the National Labor Relations Act approaches the calculation of the amount of the award far more narrowly than was envisioned in *Ex-Cell-O* in 1970. HR 8410 provides that the award:

'Shall be measured by the difference between (i) the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics, Average Wage and Benefit Settlements, Quarterly Report of Major Collective Bargaining Settlements for the quarter in which the delay began. If the Secretary of Labor certifies to the Board that the Bureau has, subsequent to the effective date of the Labor Reform Act of 1977, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection use the compilation certified by the Secretary.'

This formula achieves a reasonable estimate of the actual loss to employees while avoiding the necessity for arguing the relevance of a range of data in each case in a post-hearing setting. We note also that it altogether by-passes

litigation of the issue of whether or not a particular employer would have reached contract or agreed to a particular provision. In view of the fact that this issue is created by Respondent's conduct in refusing to bargain, this approach is entirely consistent with the purposes of the Act. cf. *Fibreboard Paper Products Corp.*, 180 NLRB 142, 72 LRRM 1617 (1969), enf'd *sub nom Steelworkers v NLRB*, 436 F 2d 908, 75 LRRM 2609 (DC Cir. 1970). Respondent in *Fibreboard Paper Products Corp.*, 138 NLRB 550, 51 LRRM 1101 (1962), violated Section 8(a)(5) by failing to bargain about its decision to contract out its maintenance operations. During proceedings to determine the amount of backpay owed to the employees terminated as a result of its decision, Respondent contested the formula selected by the Board with the argument that it could not be assumed, and in fact was unlikely, that Respondent would have agreed to that formula if it had bargained. The Board's decision stated:

'In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached . . ." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula". On the other hand, it is by no means clear that the parties could not have reached an agreement in 1959 which would not have eliminated the "Pabco formula". The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by the Respondent, which bears the risk of that uncertainty. *Fibreboard Paper Products Corp.*, *supra*, 180 NLRB at 144.'

We do not have statistics on wages or collective bargaining settlements in agricultural labor comparable to the BLS data used in the proposed NLRB formula and could not therefore adopt such a precise formula at this early stage. However, we do think it appropriate to try to reduce the number of elements which are subject to dispute in each case, and to simplify the calculation of the amount of the award to each employee.

In addition to these practical advantages, we think this approach is preferable in terms of its impact on the bargaining process. We prefer to leave to the parties the tasks of costing out and weighing one particular provision against another. We think that an award based on a more general estimate of the cost of a contract allows more room for this negotiation process to be worked out in the manner most appropriate in each case, because it does not inject the Board into the process of assessing alternatives. Furthermore, since such an award is based to an extent upon generally applicable data drawn from employers who bargained in good faith, it will reflect the settlements they have reached. This will tend to eliminate any competitive advantage obtained by an employer who bargains in bad faith over employers who pay higher labor costs because they complied with the law, thereby further reducing 'the incentive to mock the statute's promises. . . .'

We therefore shall proceed on the basis of these principles to calculate the amount of the make-whole award."

114. Another view on possible approaches is found in the following excerpt from the opinion of former NLRB Chairman Frank McCulloch and Board Member Brown in *Ex-Cello Corp.* (1970), 185 NLRB 107 at p. 118-119:

“Accordingly, uncertainty as to the amount of loss does not preclude a make-whole order proposed here, and some reasonable method or basis of computation can be worked out as part of the compliance procedure. These cannot be defined in advance, but there are many methods for determining the measurable financial gain which the employees might reasonably have expected to achieve, had the Respondent fulfilled its statutory obligation to bargain collectively. The criteria which prove valid in each case must be determined by what is pertinent to the facts. Nevertheless, the following methods for measuring such loss do appear to be available, although these are neither exhaustive nor exclusive. Thus, if the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining. The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry. Or the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics.

And there is other available significant data which may be utilized to indicate the value of the lost collective-bargaining opportunity. For example, the Bureau of Labor Statistics conducts an annual study of union wage scales in the building, construction, local transit, local trucking, and printing industries. This study covers all local unions in 68 selected cities. BLS similarly makes a quarterly wage survey of seven major construction trades in 100 selected cities. The Bureau also issues monthly reports of wage and benefit changes under collective-bargaining agreements in manufacturing establishments employing 1,000 or more production and related workers. A related survey of wage developments in smaller manufacturing units covers both unionized and nonunionized establishments. There are other Bureau of Labor Statistics facts which may bear on the remedy. One of significance is the periodic wage and benefits survey of 50 manufacturing and 20 nonmanufacturing industries. The data collected in this program reports on about 20 million employees on both a national and regional basis, usually with listings by size of establishment, size of community, collective-bargaining coverage, and type of product or plant group. Another Bureau of Labor Statistics program periodically gathers wage and benefits data on a Standard Metropolitan Statistical Area basis for more than 60 occupational categories in all but the smallest establishments. Depending on the type of industry, these surveys cover from 8 to 72 metropolitan areas. Guidance may also be forthcoming, on occasion, from other forms of data frequently cited in the collective-bargaining process, such as Consumer Price Indices and productivity statistics. Other relevant wages and benefit information will be available to the General Counsel and the parties from private sources and their use and usefulness in the compliance process will likely vary with the particular circum-



stances of the individual case. Furthermore, additional data could become available through new compilations which might later be undertaken by the Bureau of Labor Statistics or other agencies, including this agency, as well as by unions, employers, and private and public organizations and institutions.

In the instant case, as noted above, a *prima facie* showing of loss can readily be made out by measuring the wage and benefit increments that were negotiated for employees at Respondent's other organized plants against those given employees in this bargaining unit during the period of Respondent's unlawful refusal to bargain. Granted that the task of determining loss may be more difficult in other cases where no similar basis for comparison exists, this is not reason enough for the Board to shirk its statutory responsibilities, and no reason at all for it to do so in a case such as this where that difficulty is not present."

115. We are sensitive that too arbitrary an approach to this kind of monetary loss might have the effect of unduly burdening employers and, accordingly, we embark on this new direction with caution. However, if we make no effort to chart this course, employees and trade unions will continue always to bear the loss. The fear of over compensation, in many contexts, has all too often resulted in no compensation with iniquitous results. To a very real extent, bargaining orders simply direct an employer to do what was originally required except that by virtue of the unlawful conduct the employer may have weakened the bargaining position of the union and thereby strengthened his own position. If awarding employees compensation for economic losses established by reasonable proof has the incidental effect of making such misconduct less attractive, it would be unduly restrictive to rule out this more effective remedy because of the incidental deterrent effect. Clearly, the preamble to the Act demands this Board to devise a compensatory remedy where this is at all possible. See Note, *The Need For Creative Orders Under Section 10(c) of the NLRA* (1963), 112 U.Pa.L.Rev.69.

### (3) A Collective Agreement Cannot be Imposed

116. In earlier cases the Board has concluded that it lacks the power to impose a collective agreement under section 79. The first case to consider the issue was *De Vilbiss (Canada) Limited, supra* where the Board sounded its reservations at paragraph 23 without deciding the matter. The panel in that case, which included the present Chairman and Board Members Bell and Hodges, made the following observations.

"As for the complainant's request that the respondent be directed to enter into a collective agreement, we have serious reservations that it is the appropriate remedy in the circumstances. We would first note that the United States Supreme Court has told the National Labour Relations Board that it does not possess the power to impose such a remedy. (See *H.K. Porter Company Inc. v. NLRB* (1970) 62 L.C. ¶10,696.) While the facts at hand might be distinguished from *H.K. Porter* on the basis that here the trade union is asking for little more than the employer unilaterally implemented during the negotiations in breach of the Act and the wording of section 8(d) of the *Wagner Act* is much more specific with regard to the parameters of the bargaining duty, this Board cannot ignore the fact that labour relations in the private

sector has, for the most part, been based upon a concept of voluntarism or freedom of contract. For this reason – a reason that figured prominently in the *H. K. Porter* decision – we have doubts that the Board possesses the authority to respond to this particular request of the complainant. However, it is unnecessary to finally resolve this issue because we believe that in the circumstances the parties are quite capable of arriving at their own agreement provided the employer immediately commences to bargain in good faith and makes all reasonable efforts in the direction of making a collective agreement. If the complainant is satisfied with the terms that the respondent recently implemented, bargaining can be narrowed to the few outstanding issues that remain. Accordingly, we direct the respondent to begin to bargain in good faith and make all reasonable efforts to make a collective agreement with the trade union. And in this regard, we also direct the respondent to commence negotiations by arranging to meet with the complainant within a reasonable period of time from the release of this judgment. There is no need for the Board to retain jurisdiction over this matter in that a subsequent failure to bargain in good faith would amount to non-compliance with our direction. Upon following the appropriate procedure (see *USW and Chairtex Manufacturing Ltd. et al* [1971] 3 O.R. 154), such non-compliance would cause the Board to file a copy of this determination in the office of the Registrar of the Supreme Court “Whereupon the determination shall be entered in the same way as a judgment in order of that Court and is enforceable as such”.

117. Counsel for the Complainant stressed that the *De Vilbiss* case demonstrated the inadequacy of the Board’s conclusion because a collective agreement was not subsequently achieved by the parties. We would note, however, that an application alleging non-compliance with the Board’s bargaining order was never undertaken by the trade union in that case. Surely, it is incumbent on the beneficiary of a bargaining order to husband the directive carefully and, in a non-compliance proceeding, there is a heavy onus on a respondent to persuade this Board that its subsequent conduct is consistent with the spirit and intent of the Board’s bargaining order. This is particularly the case in first agreement situations for all of the reasons associated with the difficulty of distinguishing continued bad faith from hard bargaining. Once having breached the Act, offending parties should not be surprised to find that to establish a bona fides intent they may be required to act temporarily in ways that the Board does not demand of others.

118. Following *De Vilbiss* the Board had two other occasions to consider further the existence of a power to impose an agreement. On both occasions the Board held that it lacked the authority to do so. See *Ottawa Journal*, *supra* page 322 *et sequitur* and *The Daily Times*, *supra* at page 610-11.

119. In the *Ottawa Journal* case, *supra* beginning at paragraph 54 the Board reasoned:

“The relief requested by the unions was what they termed a “make-whole” order. The components of this relief, as argued by the unions, would be the imposition by the Board of the contractual terms that they would have been expected to reach had there been good faith bargaining, such terms to be retroactive to the expiry date of the paper’s own contracts, damages to the

employees for loss of wages and other employment benefits from the time of the lock-out, and damages to the union for its litigation and lock-out expenses. Put more bluntly, the unions were asking that the Board resolve this dispute by acting as an interest arbitrator, arguing that such a remedy was the only effective deterrent against failures to bargain in good faith.

This request for “make-whole” relief has serious implications for the collective bargaining process in this Province. This process, as it is defined in the *Labour Relations Act*, clearly provides that labour disputes are to be ultimately resolved by recourse to economic sanctions – The strike and the lock-out. Compulsory interest arbitration has never been an ingredient of this statutory scheme. Does the existence of bad faith bargaining allow the Board to deviate from the clear scheme of the Act when exercising its remedial authority? We think not.

The obligation contained in section 14 is an obligation to bargain. Parties to collective negotiations are required to bargain in good faith and to make every reasonable effort to make a collective agreement, but they are not required to reach a collective agreement. Good faith bargaining cannot be equated to the execution of a collective agreement and, conversely, bad faith bargaining cannot be equated to a failure to reach agreement. In other words, it is possible for the parties to comply with the obligation set out in section 14, and still not reach agreement. Where the obligation is breached, therefore, it cannot be assumed that an agreement would have been reached but for the existence of bad faith bargaining. The imposition of a collective agreement, therefore, is not within the scope of the Board’s remedial authority where it is attempting to redress a failure to bargain in good faith.

Not only would the imposition of an agreement be inconsistent with the scheme of the Act, but it would be a remedy that would be difficult for the Board to implement. What would be the terms of the collective agreement that the Board would impose? The unions argue that it would be the agreement that would have been reached if the failure to bargain had not occurred. It is possible, however, that, even if there was a breach of section 14, a collective agreement might not have resulted. And, even if we were to conclude that a collective agreement would have been reached, we might also conclude that the terms of that agreement would be most unfavourable to the unions. The problem with the remedy proposed by the unions is that it would require the Board to engage in an exercise of speculation. The Board would be venturing into the uncertain sea of interest arbitration without benefit of even such rudimentary navigational aids as the criteria that are found in those statutes that provide for interest arbitration.

The use of interest arbitration as a section 14 remedy would also pose dangers to the collective bargaining process itself. There would be a great temptation for parties to abandon the bargaining table for the Board where the bargaining process was not working in their favour. In other words, parties might well seek to gain concessions at the Board that they could not gain at the bargaining table. We do not consider that the Legislature ever intended



to supplant the bargaining process by imposing a duty to bargain in good faith, and providing the Board with extensive remedial powers. This duty, and the Board's remedial powers, exist to complement the bargaining process, not to displace it."

120. The Complainant has asked, in effect, that we reconsider this conclusion arguing that the Board has put the most effective remedy beyond its reach and that, without specific direction from the Legislature, it should assume it has the power, subject to the courts advising the Board to the contrary. Counsel to the complainant went on to point out key differences in wording between Ontario's legislation and the American legislation construed by the United States Supreme Court in *H. K. Porter Company et al* (1967) 56 LC¶12, 322 (CA-DC); [1968] CCH NLRB¶20,040; (1969) 60 LC 10,043. This argument is not unpersuasive; indeed it is tempting. But after careful reflection the Board remains of the view that it lacks jurisdiction to grant the requested relief. It is tempting for the Board to approach its remedial powers in the suggested manner particularly where it believes its directives are being flouted or treated as a licence fee for continued violations. But to give vent to such emotional responses is to adopt the position that this Board will exceed proper statutory parameters anytime it believes the legislation to be inadequate. If the statute, as currently drafted, is inadequate to get at the roots of first agreement recognition conflict, it is as much a function of this Board's expertise to point this problem out as it is to elaborate properly the general language used. Admittedly, no legislature can specify in detail the powers or mandate of an administrative tribunal. The use of general language is usually the wiser course, relying as it does on a thoughtful and pragmatic case by case adjudication by persons knowledgeable in the matters that come before them. This Board has tried to elaborate the statute to give ongoing life and meaning to the Legislature's intent, but there comes a point where the legislation ends and the Board can go no further. It is no more realistic to say that the Legislature should be specific on the limits of the Board's remedial jurisdiction than it is to demand specificity in any other area of the Board's mandate. Accordingly, we confirm the reasoning in the *Ottawa Journal* case, and wish to add a few additional thoughts because of the importance of this issue to the ongoing process of labour law reform.

121. The Act was amended in 1975 and for the first time the Board was given original jurisdiction to administer the duty to bargain in good faith. When that change was made one can assume that the legislative draftsmen were familiar with the *H. K. Porter* case and the constraint it imposed on labour law remedies. If it was intended that the Board have a power to impose contracts, and to avoid the *H. K. Porter* result, the wise course would have been to make this power explicit. It is also of note that the only jurisdiction which had accorded such a power to its labour board by 1975 was the Province of British Columbia and there the power was and remains exercisable only on a reference from the Minister of Labour and only in first contract situations. In addition, the power is confined to the imposition of a one-year contract. Those constraints reflect both the fundamental nature of this kind of government intrusion into an otherwise free collective bargaining system and the basic value of voluntarism that underpins our political system. Where other jurisdictions have followed suit, they have not conferred a general power to impose contracts, but have adopted British Columbia's more limited approach. (See *Canada Labour Code* R.S.C. 1970, c.L-1, s. 171.1 and *Quebec Labour Code* R.S.Q. 1964 (as amended 1977, Bill 45, s. 81d.) In the face of that 1975 legal climate, it is simply unreasonable to conclude that the Ontario Legislature intended to give this Board the power to impose collective agreements of unspecified durations on any bargaining relationship by simply removing the word "person" from the open-

ing words of section 79 thereby making it clear “any complaint alleging a contravention of [this] Act” could be resolved under the section. See *De Vilbiss, supra* at page 60.

122. It is also interesting to observe that the only reference to interest arbitration in the 1975 amendments was the now litigation-prone addition of section 34c providing a legal structure to encourage and support the *voluntary* arbitration of interest disputes. In our view, this amendment embodies the sentiment expressed in the following excerpt from *York Regional Board of Health, supra* at page 263, and points in the opposite direction to that which the complainant would have this Board take.

“A study of our labour laws reveals a presumptive right of employees to withdraw their services if they cannot accept the terms and conditions of employment offered to them by an employer and the correlative right of an employer to refuse to employ employees on terms and conditions which it considers to be unacceptable. Whether viewed as a carry-over from classical economic theory; as a fundamental expression of Western values; or as a pragmatic assessment of the most acceptable way to resolve employment related conflict, the fact is that we have adopted a system of countervailing power to resolve disputes over terms and conditions of employment – a system called collective bargaining. As a general matter exceptions are not made for groups of employees or individual employees who lack the raw bargaining power to “win” what they want or need under these ground rules. Once the power of collective action is granted to a group of employees, they and their employer must come to terms with this relationship and the “logic” of the economic forces that constrain their freedom of action. Similarly, exceptions are not made on the basis of the preferences of employees and employers for some other approach. The Labour Relations Act must accommodate an array of industries, any one of which may be more suited to a very different approach to its labour relations.”

123. Finally, reference should be made to the explicit scheme of the Act. Wherever contractual terms have been imposed on the parties, the Legislature has done so specifically. This is so in respect of the no-strike and lock-out pledges (section 36), grievance arbitration provisions (section 37), contract term (section 44), union security (section 36a), and religious exemptions from union security arrangements (section 39). This is another indication that one cannot lightly conclude the Board has the power to impose directly all the terms of a collective agreement on particular parties.

124. However, we wish to make it very clear that all of the foregoing is not to say that bargaining orders, cease and desist directions, and findings of bad faith cannot have an indirect impact on the content of a collective agreement. For example, surely this Board has the power to direct a party to cease and desist in the making of unlawful or inflammatory proposals and, in doing so, the content of any resulting collective agreement will be indirectly affected. Nothing we have said above is inconsistent with this result. Any other view would unduly constrain the Board in fashioning effective relief and amount to an overly technical application of this third general principle.

#### ORDER OF THE BOARD



125. In the facts at hand, the Board is of the view that a broad range of remedies is required to attempt to redress the persistent and flagrant unfair labour practices of the Respondent. The Complainant has advised the Board that its supporters are almost totally demoralized and that many have quit the Respondent's employ. Its opinion in this respect is not inconsistent with the history of this collective bargaining relationship. Any remedy should have the purpose of redressing monetary losses and providing the Complainant with a reasonable opportunity to recapture the early momentum that sparked both certification applications.

(a)(i) The Board declares that the Respondent has failed to bargain in good faith and make every reasonable effort to make a collective agreement at all times relevant to this complaint.

(ii) The Board further declares that the Respondent's position on union security violates sections 14, 56, 58, and 61 of *The Labour Relations Act*.

(iii) The Board declares that the Respondent contravened sections 56, 58, and 61 of *The Labour Relations Act* in hiring persons to infiltrate the Complainant; in hiring a private investigation firm to surveil meetings held by the Complainant; and in photographing employees on the picket line at the commencement of the strike.

(iv) The Board declares that various conversations of Jack MacDonald with employees on the picket line about possible decertification applications amounted to violations by the Respondent of sections 56, 58, and 61 of *The Labour Relations Act*.

(v) The Board declares that the Respondent's earlier direct communications with its employees by way of newsletters violated sections 14, 56, 58, 59, and 61 of *The Labour Relations Act* and that the recent publication thanking non-striking employees violated section 56.

(b)(i) The Board directs the respondent to bargain in good faith and make every reasonable effort to make a collective agreement. To this end, the Board specifically directs the respondent, on the receipt of this decision, to convene forthwith a series of bargaining meetings between itself and the complainant with the assistance of a Ministry of Labour mediator and, at the initial meeting, to make a complete proposal that the respondent is willing to accept as a collective agreement. In making this proposal the respondent is directed to cease and desist in its position on union security that we have found to be part of a continuing scheme to divide the loyalties of its employees; to undermine the exclusive bargaining agent status of the trade union; and to coerce employees into withdrawing support from the complainant or from commencing to support their complainant.

(ii) The respondent and its agent are directed to cease and desist from all other activities found by the Board to have been in violation of the Act and, more specifically:

- A. Engaging in surveillance of employees' activities in respect to union organization;
- B. Intimidating and coercing employees into withdrawing from the complainant union or from supporting the complainant union;



- C. Causing employees to act as informers in an effort to determine the extent of union activities of other employees in the bargaining unit;
- D. Communicating directly with employees with a view to undermining the exclusive bargaining agent status of complainant union;
- E. In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist the United Steelworkers of America or any other labour organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or to refrain from any or all such activities.

(c)(i) The respondent is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at its places of business where bargaining unit employees are employed in Barrie, Ontario, including all places where notices to employees are customarily posted and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been and is being complied with.

(ii) The respondent is directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative, to the residence of each employee in the said bargaining units forthwith. An employee who must scan the Board's notices hurriedly while at work under the scrutiny of others, will not be as able to absorb the meaning and hence to understand his legal rights as one who reads them at home in a more relaxed fashion.

(iii) The respondent is further directed to publish, at its own expense, a copy of the notice marked "Appendix" duly signed by the respondent's representative, in the next issue of "Watts-Up" following the receipt of this decision, or the next subsequent issue thereto. The order is aimed at counteracting the widespread impact of the respondent's earlier improper statements made in this employee publication.

(iv) The Respondent is directed forthwith to convene during working hours a meeting of all bargaining unit employees in both bargaining units currently working on company premises and a representative of the Respondent is directed to read the attached notice marked "Appendix" to the employees. The Respondent is further directed to afford two representatives of the Complainant a reasonable opportunity to be present at the said meeting and to address the employees for no longer than thirty minutes immediately following the reading of notice by the Respondent's representative.

(v) The Respondent is directed forthwith to provide the complainant with a list of names and addresses of all the employees in both bargaining units and to keep this list updated for one year from the receipt of this decision. This request is justified under section 14 as essen-

tial bargaining unit information to permit the Complainant to communicate with all the employees it represents in the most reasonable and complete manner. In addition, the employer's misconduct in this case, including the improper surveillance, is likely to have inhibited other forms of communication that might have been available to the Complainant. In this sense our direction is based on a need for the employer to rectify the distortion it has caused in communications between the Complainant and those people it represents. The Complainant must insure that access to this information is limited to responsible and accountable trade union officials.

(vi) The Respondent is directed to provide the Complainant for a period of one year from the receipt of this decision with reasonable access to all employee notice boards at the subject locations for the posting of union notices, bulletins and other union business literature in order that the employees may have free and ready access to information in the workplace from the Complainant concerning all aspects of collective representation and the collective bargaining negotiations.

(d)(i) The Board further directs the Respondent to pay all of the Complainant's negotiating costs incurred to the date of this decision and all extraordinary organizing costs arising out of the organizing of both the full and part-time bargaining units as damages caused by the improper actions of the respondent. The Board will remain seized of this issue and on application by the Complainant will determine the actual and allowable losses in this respect. We have decided against awarding the Complainant its legal costs in this matter. The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

(ii) The Board further directs that the Respondent is obligated to pay to all bargaining unit employees all monetary losses that the Complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate heretofore a collective agreement due to the Respondent's earlier unlawful conduct, the said damage, if any, running up to the date of the first meeting convened by the Respondent in accordance with paragraph (b)(i) of the Board's order, together with interest as appropriate. The Registrar is directed to reschedule this matter for hearing and determination on the issue of damages on the application of the Complainant and the Board remains seized of this case for such purposes.

(e) Having regard to the history of unfair labour practices in this case, the Respondent is directed to give the Complainant reasonable notice should any supervisor or company agent convene any group of bargaining unit employees and address them on the question of union representation within one year from the receipt of this decision. The respondent is further directed to afford two representatives of the Complainant a reasonable opportunity to be present at the speeches and upon request to permit one of them to address the employees for the same amount of time as the Respondent's address.

#### **DECISION OF BOARD MEMBER, C. G. BOURNE:**

1. I dissent.

2. The history of events at the respondent's location in Barrie, up until May 1979, is unsavoury, to say the least. But it must surely be the events subsequent to that time which are the subject of bad faith bargaining in this instance.
3. It was the testimony of Stewart Gordon that the Fort Worth headquarters of Radio Shack (Tandy Electronics) had left the Barrie operations in the hands of local management; that they had not bothered to keep abreast of developments there, and had not been kept informed of the certification proceedings and Court actions. In December 1978, it was testified, corporate management, greatly concerned, sent Stewart Gordon to obtain a first-hand report of the poor image resulting from its labour relations.
4. As a result of Gordon's report, a new bargaining structure was devised, with Gordon actively participating with the assistance of new counsel in the person of Bruce Binning.
5. Both parties are in substantial agreement with the progress of the new round of bargaining. Sessions were held June 7, 14 and 29, July 2, 24, 26 and August 8. This last meeting was not face to face but conducted by Mediator Fraser Kean.
6. Gordon testified that when the new round of negotiations started on June 7, "almost twenty-six articles, with one hundred and twenty-five sections, were outstanding, and that after meetings (in June and July) the outstanding issues had been reduced to three, viz: absenteeism, rules and regulations and dues check-off". The testimony goes on to say that (Gordon) "told Berry that the respondent would modify the absenteeism policy and the personal rules in all areas Berry believed them to be improper", *but Berry insisted that neither matter should be included in the contract*". (My emphasis.)
7. On July 26 Berry confirmed that the union security and rules and regulations issues were strike issues. When asked by counsel in cross-examination whether or not rules and regulations were a non-negotiable issue, Berry did not answer directly, but merely said "we didn't even want them in the collective agreement".
8. In his testimony Berry admitted he had said to Gordon that "if the dues issue fell, the others would drop". This was enlarged upon in Gordon's cross-examination in quoting Berry's statement that "if we would exclude rules and regulations and absenteeism and changed our position on check-off we would have an agreement".
9. The majority award has found that these bargaining sessions were "surface bargaining", which is to say, there was no real intent to arrive at a collective agreement. The shadow of negotiations before the entrance of Gordon and Binning has convinced the other members of the Board that the leopard hasn't changed its spots. Yet the evidence persuades me that both parties had entered into "hard bargaining" and had run across intractable positions on both sides by August 8 – the company's stance with regard to the dues check-off being countered by the union's adamant position on rules and regulations as well as check-off.
10. The Board appears to be in agreement with a definition of bargaining in bad faith but differs in its interpretation of the events in this case. The majority award sees the totality of events as the determining factor and cannot believe the professions of change of heart on the part of the new team. For my part, I find the explanation perfectly believable. There is no reason to doubt Tandy Electronics' policy of a "hands off" approach so long as the profit



picture was satisfying. And there is certainly no reason to doubt that their preference would be to get along without a union. On the other hand it is equally credible that they should be alarmed at the bad publicity the company had evoked by their reaction to events in 1978. Events speak louder than words and their new team, which brought a whole grab-bag of unresolved issues down to three between June 7 and August 8, 1979, surely gives an indication of bargaining in good faith. Their resistance to the check-off is mirrored in the union's equally adamant position to secure one.

11. The literature on good/bad faith bargaining is extensive, and is listed in some detail in the majority report, so there is no need to repeat it here. Perhaps the approach is best summed up in two extracts – from *Journal Publishing Co. of Ottawa Ltd.*, [1977] OLRB Rep. 309:

“The obligation contained in section 14 is an obligation to bargain. Parties to collective negotiations are required to bargain in good faith and to make every reasonable effort to make a collective agreement, but they are not required to reach a collective agreement. Good faith bargaining cannot be equated to the execution of a collective agreement and, conversely, bad faith bargaining cannot be equated to a failure to reach agreement. In other words, it is possible for the parties to comply with the obligation set out in section 14, and still not reach agreement. Where the obligation is breached, therefore, it cannot be assumed that an agreement would have been reached but for the existence of bad faith bargaining. The imposition of a collective agreement, therefore, is not within the scope of the Board's remedial authority where it is attempting to redress the failure to bargain in good faith.”

and in *Canadian Industries Limited*, [1976] OLRB Rep. May 203:

“Recognition requires each party to approach collective bargaining with the objective of entering into a collective agreement. This means that a failure to reach a collective agreement cannot be motivated by an unwillingness to recognize the other party. The requirement to recognize the other party does not mean, however, that a party can establish a failure to bargain in good faith by simply proving that its terms were not accepted by the other party. This type of proof, going to content of the proposals rather than to the conduct of the negotiations, would be insufficient to establish a lack of recognition.”

12. Taking all the above into consideration I would rule that the parties be directed to bargain in good faith with the assistance of mediation. To quote from paragraph 66 of the majority award:

“... both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act.”

13. Since, in my opinion, bargaining in bad faith has not been established, I cannot

agree with the remedies suggested. In particular, I find the order in paragraph 125(b)(i) “that the Respondent be directed to cease and desist in its position on union security” an imposition that flies in the face of the Board’s established policy and practice.

#### **DECISION OF BOARD MEMBER OLIVER HODGES:**

1. I concur with the Chairman in finding that the Respondent’s actions, from the moment it became aware of the Complainant’s organizing activity, were intended to prevent its employees from being represented by the trade union of their choice in collective bargaining, and thus hold that the Respondent had contravened sections 56, 58 and 61 of the Act. Furthermore, I am satisfied that the conduct of the Respondent at the bargaining table from November until the beginning of June was overt bargaining in bad faith. While I agree that substantial progress in bargaining towards an agreement was made after that time, nevertheless I am of the view that the Respondent did not *ever* intend to enter into a collective agreement with the Complainant. The Respondent’s collective bargaining stance after June, although tough, appeared somewhat conciliatory. However, in the absence of any direct evidence from responsible company officials indicating a change in the Respondent’s motives, I am in agreement with the Chairman in holding that the actions of the Respondent after the beginning of June, when considered together with the earlier unlawful conduct, amounted to bargaining in bad faith in violation of section 14 of the Act.

2. The Chairman has attempted to provide the Complainant and the employees in the bargaining unit with a remedy for the damages which they have suffered as a result of the Complainant’s violations of *The Labour Relations Act*. I concur with the Chairman in holding that the circumstances of this call for the exercise of almost all of the remedial powers which the Board has been given by the Legislature. I agree with the granting of the remedial relief set out by the chairman, as far as it goes. However, I disagree with the Chairman’s interpretation of section 79(4) of the Act which holds that this Board does not have the jurisdiction to impose a first collective agreement.

3. The position taken by the Respondent before the Board in the earlier certification and unfair labour practice proceedings leads me to doubt the efficacy of the remedial relief fashioned by the Chairman, notwithstanding the representations made by counsel that the respondent had seen the error of its ways and had changed its attitude towards the Complainant and the Board. In the circumstances of this case, having regard particularly to the absence of any first hand evidence from an officer or official of Radio Shack regarding a change in attitude or motive, I am concerned that the remedial relief in this case, which does not include the imposition of a first collective agreement, is an invitation to the Respondent to continue with bad faith “surface” bargaining. In my opinion, when the Board is faced with an employer which has stated that it will get rid of the union no matter the cost, the Board must respond with a remedy which will ensure that the Union can achieve a collective agreement. In this case, that remedy is a collective agreement, the terms of which may be determined by this Board, based upon the final positions taken by the parties immediately prior to the strike.

4. The Board has the authority, as the Chairman has noted, under section 79(4) of the Act to provide an effective remedy for violations of the Act. In my view, that remedy must be a realistic and practical one. It must recognize that the respondent in this case has exhibited an atavistic attitude towards trade unions and the rights of employees to engage in

collective bargaining reminiscent of the 1920's. To direct the Respondent to bargain in good faith and to cease and desist from its position on the issue of union security is one step towards forcing the Respondent closer to a collective agreement with the complainant. To award damages resulting from the Respondent's violation of section 14 of the Act based upon the loss of the opportunity to enter into a collective agreement at an earlier point in time, the amount of those damages to be assessed by the Board, is another step towards forcing the Respondent closer to a collective agreement with the Complainant. However, the relief fashioned by the Chairman is not enough.

5. This employer has already flouted the law and has failed to comply with earlier Board orders. The Union was precluded from engaging in fruitful collective bargaining by the Respondent. The Board has been advised of the outstanding bargaining issues and is aware of the parties' respective positions. The Board's cease and desist order with respect to union security will result in the compulsory deduction of union dues from the wages of all employees in the bargaining unit if a collective agreement is signed. In my opinion, *The Labour Relations Act* confers upon the Board the necessary jurisdiction to take the next step to guarantee that this employer will not benefit from its earlier wrongdoings; that step being the settlement of a collective agreement imposed by the Board.

6. Should the Union not be able to agree upon the Employer's complete proposals for a collective agreement prepared pursuant to the Board's directions, the Board should remain seized with this complaint in order to decide upon the resolution of the outstanding bargaining issues. I would then direct the parties to sign and be bound by the collective agreement determined by the Board.

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## The Labour Relations Act

**NOTICE TO EMPLOYEES****Posted by Order of the Ontario Labour Relations Board**

We have issued this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which both the Company and the Union had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the Ontario Labour Relations Act and has ordered us to inform our employees of their rights.

The Act gives all employees these rights:

- To organize themselves;
- To form, join or help unions to bargain as a group, through a representative of their own choosing;
- To act together for collective bargaining;
- To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten our employees with plant closure or discharge or with any other type of reprisals because they have selected the United Steel Workers of America as their exclusive bargaining representative.

WE WILL NOT attempt to get employees to inform on union activities and the desires of their fellow employees.

WE WILL NOT engage in surveillance of employee activities with respect to union organization.

WE WILL NOT intimidate or coerce employees in any way into withdrawing from the United Steel Workers of America or from supporting the United Steel Workers of America.

WE WILL NOT refuse to bargain collectively with the United Steel Workers of America as the certified bargaining agent representative of all employees as directed by the Board in the following units:

- (1) All employees of the respondent in Barrie save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.
- (2) All employees of the respondent who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, and persons above the rank of foreman, office and sales staff.

WE WILL NOT in any other manner interfere with or restrain or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole the United Steel Workers of America for all losses suffered by reason of our refusal to bargain in good faith as directed by the Board.

WE WILL make whole all bargaining unit employees who suffered losses by reason of our failure to bargain in good faith as directed by the Board.

WE WILL comply with all other directions of the Ontario Labour Relations Board including:

- (1) Providing the United Steel Workers of America with reasonable access to employee notice boards in our warehouse facility for a period of one year;
- (2) providing the United Steel Workers of America with a list of names and addresses of all bargaining unit employees and to keep this list up to date for a period of one year;
- (3) providing the United Steel Workers of America with a reasonable opportunity to be present and to reply to any speech made by management representatives to assembled employees;
- (4) providing the United Steel Workers of America with an opportunity to address bargaining unit employees on company time and company premises for a period of time not exceeding thirty minutes following the reading of this notice.

WE WILL bargain collectively with the United Steel Workers of America as the duly certified collective bargaining representative of our employees in the above units as directed by the Board and if an understanding is reached, we will sign a contract with the Union.

RADIO SHACK

Dated:

Per: (Authorized Representative)

**This is an official notice of the Board and must not be removed or defaced**

**This notice must remain posted for 60 consecutive working days.**

**1465-79-U** Mr. Boris Kitsov, Complainant, v. Canadian Union of Public Employees and its Local 1764, Respondent, v. **The Regional Municipality of Durham**, Interested Party.

**Duty of Fair Representation – Grievor not truthful with Union – Union’s relationship with employer considered – Union membership deciding not to file grievance against discharge – Whether acting arbitrarily**

**BEFORE:** M. G. Mitchnick, Vice-Chairman.

**APPEARANCES:** *Boris Kitsov on his own behalf; S. R. Henessy, and others for the respondent; Donald J. Paterson for the interested party.*

**DECISION OF THE BOARD;** December 17, 1979

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2. This is an application under section 79 of *The Labour Relations Act*, alleging a violation of section 60 of the Act by the respondent trade union. That section reads as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

The complainant, Mr. Boris Kitsov, was discharged from his employment with the Regional Municipality of Durham on October 19, 1979. It is the respondent trade union’s decision not to grieve this discharge that forms the subject matter of the present complaint.

3. The complainant holds a Master’s degree in Municipal Engineering from the University of Prague, and had worked previously for the Metropolitan Toronto Roads Department. In November of 1974 the complainant commenced employment with the Regional Municipality of Durham. He applied for an engineering position, but was able to obtain only the position of draftsman.

4. From the beginning, the complainant began to develop a strained relationship with his supervisors. There was no engineer in the department when the complainant commenced employment, and he began to point out to his supervisors areas which he felt could be improved. The complainant testified that while he was able to demonstrate to his supervisors that he was technically correct in these matters, he nonetheless felt that his supervisors were becoming displeased with him as a result of his initiatives.

5. In May of 1975 the grievor applied for a vacancy in the position of Technician in the Sewer Department. Sewer design had been a part of the complainant’s university degree, and he was surprised and unhappy when he learned that Walter Evans, the Design Manager, had interviewed every applicant but himself for the job. According to the complainant, Mr. Evans responded to the complainant’s inquiry by saying, “I automatically

ruled you out". The respondent trade union subsequently initiated a grievance on the complainant's behalf, and carried it all the way through arbitration. While recognizing the complainant's technical qualifications, the majority of the board of arbitration dismissed the complainant's grievance on the ground that he lacked sufficient experience in sewer work within the Ontario context to satisfy the specifications of the job. The complainant conceded that with respect to this grievance the respondent trade union had not acted in a manner that was arbitrary, discriminatory or in bad faith. Rather, the complainant simply felt that the union could have done a better job in bringing the merits of his case home to the board of arbitration. In particular, the complainant was impressed with the professional labour lawyer retained to present the case on behalf of the Regional Municipality, and expressed dissatisfaction over the fact that the union's Business Representative presented the complainant's case without the benefit of professional assistance. That decision, of course, has always been recognized by this Board as the prerogative of the trade union, and not one with which the Board (in the absence of some pre-determined violation of section 60) will interfere.

6. In 1975 and 1976 the complainant applied for positions outside of the bargaining unit, including that of Design Engineer, but was not accepted. This left the complainant with the feeling, in his words, that the Region "had hired engineers less competent than myself". In September of 1976 the complainant came head to head with the new Design Engineer, Mr. Loudon, over the best approach to a particular design plan. Ultimately, Mr. Loudon instructed the complainant to make the change to the drawing in accordance with Mr. Loudon's own preference, and the complainant refused. As a result, he was issued a disciplinary memorandum on September 24, 1976. The respondent union initiated a policy grievance on the complainant's behalf over this memorandum. Following a two and one-half hour discussion with management, the union decided to drop the grievance. The complainant expresses some concern over not having attended the grievance meeting, but does not allege violation of section 60 over this incident.

7. The complainant testified that he was fully aware that he was not, by his actions, endearing himself to management. Indeed, at about this time, the complainant was told by Mr. Evans, according to the complainant's testimony, that he hoped the complainant would not be around for a long time, and suggested that the complainant look around for other work, although stating that the choice was up to the complainant.

8. At a departmental meeting on December 15, 1976, the complainant pointed out what he felt were certain areas of waste on a number of pending contracts. The complainant testified that his supervisors agreed with him on some of the points, but indicated that they would have found them anyway. Overall, he found the response of management at this meeting frustrating. When he later found that certain of his suggestions had not been implemented, he sent a memorandum in that regard to the Commissioner of Works, Mr. Twelvetrees. When he received no direct reply to this memorandum, the complainant, as he testified, became totally frustrated. He then took it upon himself to carry his concerns over what he felt was the incompetence of his superiors, together with the wasting of the taxpayers' money, to the news editor of a local Oshawa newspaper. The complainant's allegations received great prominence in that newspaper. Following this incident, the complainant was suspended, and the union filed a grievance on his behalf. The complainant was particularly concerned with the statement in his notice of suspension that read: "You are hereby given a final warning that any repetition of your past misconduct, will result in immediate discharge".



9. The evidence demonstrates, and the complainant concedes, that in the ensuing weeks the respondent trade union actively pursued the complainant's grievance, and a date was set for an arbitration hearing. However, three weeks prior to the hearing date, the Local Chief Steward, Mr. David Linklater, received a written opinion from the Local's Business Representative as well as their staff counsel that the grievance should not be proceeded with on the basis that, having regard to the complainant's admission that he deliberately went to the press, together with his prior record, the grievance would not be won. The complainant was given a copy of this letter. As the complainant still insisted that his grievance proceed to a hearing, the Local Executive decided to refer the matter to a general membership meeting. The turnout at the meeting was small, but the complainant concedes that the eventual vote was in favour of not proceeding with his grievance. The complainant expresses his disappointment with this decision, but concedes that it was arrived at democratically, and does not allege a violation of section 60 of the Act.

10. There was a further incident involving the complainant and Mr. Evans in November of 1978, but management did not treat the incident as disciplinary, and the union did not get involved.

11. In December of 1978 the complainant had attempted to make arrangements with Mr. Evans to leave work early on December 21st for the purpose of getting an early start on his scheduled vacation. The complainant's request was denied. The complainant then arranged on his own to leave early on the day in question by working through his lunch and coffee break. The complainant discussed this with his immediate supervisors, but was told he would nonetheless have to speak to Mr. Evans. The complainant left without speaking to Mr. Evans, and was suspended for 5 days. In the letter of suspension dated January 8, 1979, the employer commented in detail on the complainant's prior record and work relationship. Again the respondent union lodged a grievance on the complainant's behalf, and the matter has now been heard by a board of arbitration, who have not yet rendered their decision.

12. In September of 1979 the final events leading to the complainant's discharge began to take shape. The complainant, still feeling generally frustrated in his relationship with the Region, noticed in the Oshawa newspaper that one of the City councillors, Mr. Ed Kolodzie, was receiving particular prominence for his avowed concerns over the wasting of taxpayers' money. The complainant felt that Mr. Kolodzie's concerns coincided with his own, and so took it upon himself to telephone Mr. Kolodzie and, at the very least, indicate that if he were concerned about the wasting of taxpayers' money, he ought to take a serious look at the upcoming Works budget. Mr. Kolodzie, who did not testify, wasted no time in following up this matter, and the Regional Municipality again found itself embroiled in a public debate over its practices. In approaching the Region, Mr. Kolodzie had identified the complainant as his "source". The complainant was called into the office by management and asked if he had spoken to Mr. Kolodzie. The complainant denied that he had. Two weeks later the complainant was again asked by management if he had given any information to Mr. Kolodzie, and again the complainant answered "no".

13. The complainant was called into the office, along with the Chief Steward, Mr. Linklater, on October 19, 1979 and handed a letter of discharge. That letter made reference to the complainant's unsatisfactory employment history with the Region, together with the final incident which demonstrated, in the employer's eyes, the complainant's "absolute disregard of the duties" owed to his employer. Unfortunately, the letter also went on to com-

ment in great detail on the instances of "waste" raised by Councillor Kolodzie, and to ascribe the fault for such waste to the complainant's own negligence and careless workmanship.

14. The material facts surrounding the respondent trade union's refusal to grieve the complainant's discharge are not significantly in dispute, and the Board finds them to be as follows.

15. The complainant conceded that Mr. Linklater, the Chief Steward, had approached him following a meeting between the complainant and management on September 28, 1979, and had asked the complainant whether he had in fact talked to Councillor Kolodzie. The complainant further conceded that at the time he led Mr. Linklater to believe that he had not talked to Councillor Kolodzie. Mr. Linklater then wrote out a statement of the complainant's evidence, according to his "normal practice", and asked the complainant to sign it, which he did. That statement included a denial by the complainant that he had ever talked to Ed Kolodzie. The complainant testified that on the following day Mr. Linklater again asked him "quite urgently" whether or not he had talked to Councillor Kolodzie. The complainant again denied it, and indicated to Mr. Linklater that he could talk to Councillor Kolodzie himself if he wished. At a further meeting on October 1st at the complainant's house, while the Kolodzie matter was not the real subject matter of the meeting, the complainant again denied having given any information to Councillor Kolodzie.

16. In the meantime, Mr. Linklater had been attempting to get in touch with Councillor Kolodzie, and the Councillor returned his telephone call on the morning of the October 1st meeting. Mr. Kolodzie was at first hesitant to discuss the matter, according to Mr. Linklater, but eventually conceded that the complainant had confided some information to him, and that the complainant had contacted him on September 14th, 26th and 29th with respect to certain projects. Councillor Kolodzie refused to discuss the matter further, other than to indicate that the complainant had given him sufficient information to check on those projects. Mr. Linklater did not mention this conversation to the complainant at the October 1st meeting, but as they were driving together to Toronto for the complainant's suspension arbitration on October 4th, Mr. Linklater advised the complainant of his conversation with Councillor Kolodzie. At that point the complainant admitted having talked to the Councillor, and said nothing more. Mr. Linklater testified that he concluded the discussion with the complainant simply by stating that he was now aware of it, and that the full Executive was aware of it as well.

17. At this point neither the complainant nor Mr. Linklater were aware that the complainant was to be discharged, and they learned of the fact together at the October 19th meeting with management. Following the meeting a discussion took place between the complainant, Mr. Linklater, and the steward. The complainant was upset over his discharge, and in particular referred to the allegations against him as "complete fabrications". There was some mention at that time of the filing of a grievance, but the complainant indicated to Mr. Linklater that he did not want the union to get involved. The complainant indicated that he felt frustrated with the 1977 hearing conducted by the union on his behalf, and felt he would be better represented by a professional lawyer. He further indicated that he was grateful but not satisfied with the union with respect to the handling of his earlier grievances. He did, however, leave with Mr. Linklater a grievance form signed in blank, and testified that he knew that he had until the 26th October to file a grievance. Mr. Linklater indicated that



the union would need more information from the complainant before filing a grievance and the complainant undertook to obtain the information from the Region's files before the end of the week.

18. While there is some dispute as to communications between the complainant and Mr. Linklater during that week, it is clear that the complainant spent much of his time investigating the possibility of civil actions on his own, as well as attempting to obtain further information, as requested by Mr. Linklater. This the complainant was required to do through other employees in the Regional office, as he had effectively been banned from the premises at the time of his discharge.

19. The complainant finally concluded from his inquiries that civil action would take too long, and toward the end of the week contacted Mr. Linklater and asked to meet with him so that he could fill out the grievance. Mr. Linklater asked about the additional information, and the complainant indicated to Mr. Linklater that he, Linklater, was the only one in a position to obtain information for the complainant, as Mr. Linklater still worked in the Regional office, while the complainant did not. Mr. Linklater indicated that he would make inquiries and advised the complainant in any event to bring with him to their meeting as detailed a statement as possible of his defence. On the 26th of October Mr. Linklater and the complainant met and the complainant gave to Mr. Linklater the letter he had prepared. Mr. Linklater read it and indicated that he would require more information, but further stated that he would review the file and discuss the whole matter with the union Executive.

20. On Monday, October 29th, Mr. Linklater visited the complainant at the complainant's house. While there is some dispute over what was said at the time, the Board concludes from a review of all the evidence that Mr. Linklater advised the complainant that the Executive had decided not to proceed with the complainant's grievance. Following this, the complainant, as he testified, spent the next few days trying to find the best way to defend himself. He contacted various lawyers and government agencies, but was finally left with the advice that the only avenue left open to him was to proceed against the union before the Labour Board. The complainant then attended at the home of Mr. Linklater to tell him that he was sorry, but that he had no choice. On November 5th the complainant received a letter from the Board confirming the receipt of his application, and on the next day he was invited by the respondent trade union to attend a general membership meeting on November 7th to discuss his grievance. The complainant was disappointed to find, however, that the union was still requesting him to provide them with more information on which to file a grievance, as he felt he had made it clear to the union that he had done everything in his power to obtain further information, and had even suggested to the union that they obtain a Court order to gain possession of the necessary files.

21. The complainant was also disappointed over the attendance at the meeting. In addition to the five members of the Executive, there were only 12 or 14 other members of the union in attendance, and in particular, only three from the Design Section where the complainant had worked. The complainant learned afterwards that the matter of his grievance had not been mentioned in the agenda posted for the meeting. Mr. Linklater testified that he considered it "bad taste" to mention such things in the agenda, as it is posted in all offices throughout the Region. He testified further, however, that he personally notified every member of the Design Section that the complainant's grievance was being presented at the meeting, and in particular he spoke to each member of the Sewer Section where the com-



plainant had worked, asking them that if they had any information assisting the complainant, to please bring it. The complainant testified that he had gotten the impression from discussion with other members that the matter of his grievance was far less publicized than Mr. Linklater was suggesting, but there is no admissible evidence before the Board on which to contradict Mr. Linklater. In any event, while this point is of great import to the complainant's perception of the fairness of the meeting, it does not, for the reasons given below, affect the Board's decision in the matter.

22. At the meeting itself, there was, at some point, a motion put on the floor not to proceed with the complainant's grievance. The Executive presented to the membership their reasons for their recommendation not to proceed, and the complainant, as he concedes, was given the opportunity to present his side of the case. In the end, the majority of the members voted in favour of not proceeding.

23. Mr. Linklater had been a Vice-President of CUPE Local 1764, the respondent trade union, since 1975, and Chief Steward since early 1979. He testified that the Local has filed 35 grievances in total with the Region since 1975. Of those, 5 were grievances of the complainant. Only 2 grievances in those 4 years have proceeded all the way to arbitration, both of those being grievances of the complainant. Mr. Linklater testified that the reasons for his own recommendation not to proceed with the complainant's grievance were twofold. Firstly, the fact that the complainant had signed a statement for him indicating that he had not talked to Councillor Kolodzie, when that was not true; secondly, the fact that there was no evidence available on which to refute the employer's allegations of negligence against the complainant. While a great deal of the evidence centred on the second ground, it is clear, as counsel for the respondent union submitted, that Mr. Linklater's insistence on some evidence to support the negligence defence was a direct result of the complainant's lack of candour with him on the first ground.

24. Do the above facts disclose a violation of section 60 of *The Labour Relations Act*? After careful deliberation, the Board finds that they do not.

25. There was no suggestion by the complainant that the respondent union has represented him in a manner tainted with either bad faith or discrimination. Indeed, the union's history of representation of the complainant suggests just the opposite. Was the respondent's conduct "arbitrary"? As was stated in the *Barber-Coleman* case, [1976] OLRB Rep. Oct. 613, "the issue here is whether the Executive applied its mind to the matter and arrived at a decision after due consideration". As noted in the *Diamond "Z" Association* case, [1975] OLRB Rep. Oct. 791 at paragraph 10:

... In addressing itself to [the factor of arbitrariness], the Board is cognizant that the trade union must concern itself with a continuing and viable collective bargaining relationship with the employer that may very well be undermined by the indiscriminate processing of grievances.

See also the *Ford Motor Company Limited* case, [1973] OLRB Rep. Oct. 519, especially paragraph 38.

26. Here the union stated as one of its grounds for refusing to file a grievance the lack of evidence brought forward in his defence by the aspiring grievor. The union was aware,

however, of the efforts of the complainant to obtain such evidence, and of the apparent disappearance of the Region's files from their "usual place". In different circumstances, faced with such a refusal, the Board might have seriously concluded that the union had assessed the merits of the grievance in manner that was not arbitrary. In assessing the conduct of the trade union, however, the conduct of the aggrieved employee must be considered as well. Employees who expect a standard of fairness from their trade union must be prepared to deal fairly with their trade union as well. Here the complainant had clearly and deliberately led his trade union to believe that he never had any conversation with Councillor Kolodzie. The complainant explained to the Board that when he was asked by both the employer and his union whether he had ever "talked" to Councillor Kolodzie, he felt entitled to say "no" because he had not provided any factual information to the Councillor, in contrast to his extensive disclosures to the newspaper in 1977. He felt that whom he "talked" to, short of that, was no one's business but his own, so long as he did not break any laws. Whatever one might say about such verbal distinctions when confronted by an accusation from his employer, such lack of openness with his own trade union, seeking to represent him, is wholly unacceptable. The reasons are obvious. If the trade union takes the position with the employer, either in the grievance procedure or in arbitration, that, as here for example, the grievor had never had any contact at all with the elected official, and that is then proven to be patently false, the union will be embarrassed, at the very least. But of still greater significance, the employer can never be certain to what extent the union itself had knowledge of the true facts, and the union's whole credibility may thereby be undermined, to the great detriment of the other members of the bargaining unit and the trade union's continuing relationship with the employer. The trade union, therefore, had every right to be concerned, and subsequently circumspect in their dealings with the complainant, after discovering that the complainant's representations to them were not the truth.

27. The Board should add, however, that even apart from the above considerations, it would have been unable to characterize the respondent trade union's assessment of the merits of the grievance as "arbitrary" in any event. One of the ironies of this case is the extent to which attention came to focus on the allegations against the complainant pertaining to his negligence and careless workmanship, when clearly, as the employer confirmed at the hearing, the major ground for discharge was the complainant's involvement with the elected official, in light of the earlier incident with the newspapers and the complainant's overall employment history. Indeed, the complainant admitted in his evidence that following the 1977 incident with the newspapers, he was cautioned by the trade union that any repetition of such action would place the trade union in a difficult position of trying to defend him. That this was the main issue in the minds of the members at the November 7th meeting appears clear as well, as the complainant quoted one of the members as saying: "Who are you are going to believe, Councillor Kolodzie or Boris Kitzov"? Yet the complainant, as he testified, was basing his whole evidence on the files which were taken from his possession. The complainant is a man of great pride, and it is hardly surprising that his attention focused on the allegations of negligence and careless workmanship. The respondent trade union, however, while seeking to follow up both grounds, was able to see that the major issue was the complainant's contacts with the Councillor Kolodzie. From its own investigation, the respondent union discovered that the employer's understanding of the facts appeared to have some basis, and that the complainant had lied about this on two separate occasions to the employer. In this regard, the comments of the Board in the *Francon* case, [1973] OLRB Rep. Feb. 556 at p. 557, while considering the union's duty to proceed to arbitration, appear equally apt to the present circumstances:

“5. Counsel for the complainant alleges that the union’s conduct in not proceeding to arbitration was arbitrary. He does not argue that the union acted either in bad faith or in a discriminatory fashion. It is our view that there is no absolute right in a member of the bargaining unit to have his grievance arbitrated. The union is required to consider the matter and to weigh all the relevant factors. In this case the union Executive considered the matter and, based upon its understanding of the existing facts and the grievor’s earlier conduct, it concluded that the grievor’s days with the respondent employer were numbered. In those circumstances it decided not to proceed to arbitration. In our view the union has done all that it was required to do within the meaning of the section 60 of *The Labour Relations Act*. It did not act in an arbitrary fashion because it considered the grievor’s position in the light of all relevant factors including the result of the earlier incident and counsel’s opinion at that time. It put its mind to all the circumstances and concluded that the grievor would be faced with termination of his employment. The union then decided not to proceed. The issue is not whether the union was right or wrong in its assessment, but whether the union considered the matter fully and arrived at a decision after due consideration. In our view the consideration given to the circumstances of this case by the union negates any consideration of arbitrary conduct within the meaning of section 60 of the Act and the complaint is therefore dismissed.”

28. The last matter with which the Board must deal is the membership meeting of November 7th. Neither party filed with the Board a copy of the union’s constitution, and thus there is no indication that the opportunity afforded to the complainant to support his grievance was one to which he had a legal right. Accordingly, as a gratuitous act, any deficiency in the notice calling the meeting would not be material to the Board, unless of course the trade union itself seeks to rely on such a meeting to cure its otherwise inadequate level of representation. Such is not the case here.

29. The Board regrets that the foregoing leaves the complainant in a position where he has no opportunity to challenge the particular allegations made with respect to his own care and workmanship. See *General Motors of Canada Limited v. Brunet*, [1977] 2 S.C.R. 537. However, as the employer and the complainant place entirely different emphases on the actual reasons for his discharge, it may be that voluntary and informal discussions can take place so as to allow a sufficient airing to accommodate the interests of all parties and ensure a final end to this whole affair. There being no violation of section 60 by the respondent trade union, however, this complaint is dismissed.

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**0919-79-R Canadian Union of Public Employees, Applicant, v. The Regional Municipality of Peel, Respondent.**

**Appropriateness – Bargaining Unit – Agreement excluding students – Whether Board accepting agreement of parties**

**BEFORE:** N. B. Satterfield, Vice-Chairman and Board Members D. B. Archer and J. D. Bell.

**APPEARANCES:** *J. Anderson for the applicant; Donald E. Houck and S. G. Craig for the respondent.*

**DECISION OF THE BOARD;** December 19, 1979

1. This matter arises out of an application for certification in which the applicant asked for a pre-hearing representation vote which was held on September 20, 1979 as directed by the Board. The Board also directed that the ballot box be sealed pending the result of a hearing into the nature and composition of the bargaining unit.

2. The applicant is seeking to be certified for a unit comprised of the respondent's part-time employees at Sheridan Villa. The applicant and respondent are agreed that students employed during the school vacation period should be excluded from that unit and there were students employed on the application date. It was this agreement of the parties to exclude students from the unit that caused the Board to schedule a hearing because:

- (a) it is the Board's general practice to keep students and part-time employees together wherever one group or the other is being included in or excluded from a bargaining unit if to do otherwise would leave the students standing alone; and
- (b) the Board has refused to exclude students from a unit of part-time employees notwithstanding the agreement of the parties to do so (see *Plummer Memorial Public Hospital*, [1979] OLRB Rep. May 433).

3. Both parties submitted that, *inter alia*, the following reasons were good and sufficient ones for the Board to accept their agreement. The applicant is bargaining agent for a unit of full-time employees at Sheridan Villa as well as units of a full-time and part-time employees at Peel Manor which is also operated by the Regional Municipality of Peel. Students are excluded from all three units. Furthermore students are excluded from other bargaining units represented by different bargaining agents with other employers having similar operations elsewhere in the municipality. Finally, there were 19 students employed by the respondent on the date of application and the parties contend that there are sufficient students to form a unit of students only which would be appropriate for collective bargaining.

4. The Board finds it of some assistance assessing these submissions of the parties to review briefly the Board's policies and practices in respect of students and part-time employees and the Board's posture in respect of agreements of parties appearing before it. While the Board encourages and usually endorses the agreements of parties appearing before it in

respect of issues with which it is dealing, particularly bargaining unit descriptions, it must balance that practice with its responsibilities under the Act and a reasonable consistency in applying its own policies and practices. The Board had held previously that the Act does not exclude students from its coverage and, as a result, has presumed that the Legislature intended that they be covered (see *The Victoria County Board of Education*, [1975] OLRB Rep. June 529, and also *St. Raphael Nursing Homes Limited (Kitchener)*, [1977] OLRB Rep. Sept. 580). At the same time, the Board realizes that students by themselves would have difficulty bargaining effectively and for that reason the Board does not deem them alone to comprise an appropriate unit if other alternative, appropriate units are available for formation; e.g., by including them with part-time employees as would the case here. This was an obvious consideration of the Board in *Plummer, supra*, when it rejected the agreement of the parties to exclude students from a unit of part-time employees stating that the Board's practice of including students in a unit of part-time employees "... is predicated upon its belief that students employed during the school vacation period could not form a viable bargaining unit standing alone and even if they could, the result would be to create an unduly fragmented situation." Subsequent decisions of the Board have followed *Plummer* and more recently, in *Dominion Steel Export Company (Domex)*, Board File No. 1216-79-R, (as yet unreported), the Board dealt with a question of whether it would exclude part-time employees and students employed during the school vacation period from a bargaining unit when there was a practice of employing students but no practice of employing part-time employees. The Board decided that it should "... continue to approach these two kinds of employees in tandem to avoid potential fragmentation in the future." and described the unit to exclude part-time employees as well as students. Thus beginning with *Plummer, supra*, the Board's decisions demonstrate a practice of not accepting the agreement of the parties in respect of bargaining unit descriptions if those descriptions result in students being left to stand alone, or if they might lead either to that result or to future fragmentation of the employer's work force.

5. Turning now to the parties' submissions, the Board finds no comfort or assistance in determining whether the unit to which the parties have agreed is appropriate in the fact that there were 19 students employed at the time of the application. Section 6(1) of the Act empowers the Board to find a bargaining unit of two employees to be appropriate. So, hypothetically at least, it could be said that a unit consisting of two students is appropriate but its viability would be highly questionable at best. On the other hand, there is a history of collective bargaining between these parties which has excluded students; a history which is consistent with the prevailing patterns existing between other employers and bargaining agents involved with similar operations within the municipality. The Board notes also from the applicant's membership evidence that its organization campaign took place prior to and very shortly after the issuing of the Board's decision in *Plummer, supra*. It is reasonable to conclude from the latter fact that the applicant was unaware of the implications of that decision for its campaign.

6. Having regard to the collective bargaining history of the parties and to the timing of the applicant's membership campaign, the Board accepts the agreement of the parties in this instance. Accordingly, the Board finds that all employees of the respondent in Sheridan Villa Home for the Aged, Mississauga, Ontario regularly employed for not more than twenty-four hours per week, save and except supervisors, persons above the rank of supervisor, professional medical and nursing staff, office, clerical and technical staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The bargaining unit now being finally determined, the Board directs that the Registrar cause the ballots cast in the pre-hearing representations vote herein to be counted, excluding the segregated ballots of students, if any, and report to the Board.

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**1408-79-U** Jim Lazarou, Complainant, v. Printing Specialties & Paper Products Union, Local 466 and **Rolland, Inc.**, Respondents.

**Duty of Fair Representation – Union refusing to process discharge grievance to arbitration – Decision partly based on credibility of grievor – Whether violation of section 60**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members A. Gribben and E. C. Went

*APPEARANCES:* Jim Lazarou and George Argiris for the complainant; H. Goldblatt and Jim Elliot for the respondent trade union; D. I. Wakely and others for the respondent employer.

**DECISION OF THE BOARD;** December 21, 1979

1. The name “Rolland Paper Company Limited” appearing in the style of cause of this complaint as the name of the respondent employer is amended to read “Rolland Inc.”

2. This is an application under section 79 of *The Labour Relations Act* alleging a breach of section 60 of the Act. Section 60 provides as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

The complainant, James Lazarou, alleges that the respondent trade union has breached its section 60 obligation because it failed to carry his grievance through to arbitration.

3. When this matter came on for a hearing Mr. Lazarou appeared with a letter from his solicitor setting out certain dates when that solicitor was available. Mr. Lazarou advised the Board that he had consulted his solicitor early in October about the case, that he had received the Form 7 Notice of Hearing and that he had personally taken that notice to his solicitor's office; however, his counsel was engaged on another matter and could not be present for hearing on that day. Neither Mr. Lazarou nor his solicitor had made any effort, prior to the morning of the hearing, to contact the other parties in this matter and, in consequence, both respondents appeared with their counsel, and their witnesses, and were prepared to proceed. Counsel for the respondent employer advised the Board that his client had gone to considerable expense and inconvenience to have certain witnesses from out of town avail-



able to give evidence, if necessary. Counsel for the trade union, likewise, indicated that he had assembled his witnesses and procured their attendance on the assumption that the matter would proceed. Both respondents drew the Board's attention to the considerable delay which had already elapsed from the date of the events on which the complaint is based and the complainant's filing of this application. Both respondents opposed the request for an adjournment. In the circumstances, the Board considered it appropriate to proceed with the hearing as scheduled. The representations of Mr. Lazarou clearly indicated that both he and his solicitor were, or ought to have been, aware that November 23rd, 1979 was the date fixed for the hearing. Form 7 is clear and unambiguous in this regard. Both respondents were ready to proceed on that date. Neither the respondents nor the Board received any notice, prior to the hearing day, that the complainant would be seeking an adjournment. Neither the complainant, nor his solicitor (who appeared towards the end of the hearing) advanced any reason why such notice could not have been given so that the expense associated with securing the attendance of counsel and the witnesses could have been avoided. Having regard to the time which has elapsed since the events upon which the complaint is based, the cost and inconvenience already suffered by the respondents, and the potential prejudice of further delay, the Board decided to proceed.

4. Mr. Lazarou testified that he had been hired by the respondent employer in 1975 and discharged on or about December 4th, 1978 following his return from what he characterized as a "one-month" illness. Following his discharge Mr. Lazarou filed a grievance which was accepted by the trade union and processed at the third step of the grievance procedure. The trade union did not, however, proceed to arbitration with the grievance. It is this decision which Mr. Lazarou contends constitutes a breach of section 60.

5. In his direct evidence Mr. Lazarou testified that the reason for his discharge was the company's belief that he was not really ill. The company believed that he was running a karate studio at a time when he was supposed to be on sick leave and unable to work. Mr. Lazarou initially told the Board that the company advised him at the time of the reason for his discharge. Subsequently Mr. Lazarou changed his testimony and maintained that he had never been advised of the reason for his discharge. This was but one of many contradictions with which his evidence was replete. His recollection was selective and his answers were frequently evasive and equivocal. Clear denials, after further cross-examination, became grudging admissions. Having regard to Mr. Lazarou's demeanour in the witness stand, and the pattern and substance of his responses, the Board is satisfied that it should prefer the evidence of the respondents' witnesses wherever that evidence is any way in conflict with that of the complainant. As will become apparent, *infra*, this credibility problem, which was so evident to the Board, was also evident to the respondent trade union, and was a principal reason why the union was reluctant to proceed to arbitration.

6. Mr. Lazarou testified that between November 9th and December 4th, 1978 he was bedridden, except for occasional visits to his doctor or to a nearby restaurant to purchase cigarettes. Apart from these brief absences, he maintains that he was at home, ill. He denies that he was engaged in the business of running a karate school until at least January, 1979. He contends that the company's suspicions that he was malingering are unfounded and that his discharge was unjust. While acknowledging that James Elliot, Vice President of the respondent union, was friendly, bore him no personal animosity and had acted on his behalf on a number of occasions in the past, Mr. Lazarou argues that in this instance Mr. Elliott's conduct was arbitrary, discriminatory or in bad faith.

7. The positions of the company and union are equally straight forward. While their perspectives are somewhat different, their evidence is not really in dispute.

8. Mr. Lazarou has a long and poor employment record with considerable unjustified lateness and absenteeism. He has been warned and disciplined on a number of occasions; and was advised that his attendance must improve. In August, 1978 he was suspended for one week. This was not his first suspension for unjustified absenteeism.

9. In or about November, 1978, the company became suspicious that he was abusing sick leave and falsely claiming that he was ill. It had come to the company's attention that he had posted a business card on company bulletin boards indicating that he was available to give karate lessons. An examination of a copy of his business licence revealed that on the day he applied for his licence he "was off sick." "Coincidentally" Mr. Lazarou "took ill" shortly thereafter and remained absent from work until December 4th.

10. The company was suspicious and towards the end of November retained Mr. Grant M. Egan, a private investigator, to observe Mr. Lazarou. Mr. Egan gave evidence before the Board. We accept his evidence in its entirety despite Mr. Lazarou's denials. Mr. Egan testified that he observed Mr. Lazarou for several days in late November and early December, and that during this period (when Lazarou was, of course, on "sick leave") he spent most of the day, and a good part of the evening, at a karate studio on Danforth Avenue. Mr. Egan and a colleague made arrangements, by telephone, to attend at the karate studio and subsequently arrived, posing as potential customers. Mr. Lazarou, according to Mr. Egan, spent close to an hour with the two private detectives. He showed them the contract form and gave a vigorous ten to fifteen minute demonstration of punches, kicks and other manoeuvres associated with the martial arts. Mr. Egan also took a number of photographs of what is alleged to be the complainant at a local beer store, going in to the karate studio, and driving his car in the vicinity of the studio. Mr. Lazarou denies that he was ever at the studio at the time. He maintains he was ill. He denies ever giving demonstrations of the skills which he taught. He denies that the figure in the photographs is him. He maintains that Egan is lying. He admits that the automobile driving in the vicinity of his karate studio is the same year, make, model, colour and style of the vehicle which he owns. This, he says, is just a coincidence. On cross-examination Mr. Lazarou said that he could not remember the numbers of his licence plate and did not have his driver's licence with him.

11. On the basis of its investigations the company concluded that Mr. Lazarou was abusing his sick leave and that, in view of his previous record of absenteeism and misconduct, a discharge was appropriate. Following the discharge Mr. Lazarou approached Mr. James Elliott the Vice President of the local union in order to file a grievance. At that point Elliott was relatively optimistic as he did not believe that the employer was entitled to discharge an employee simply because of a *bona fide* illness. The grievance was accepted and filed at the third step in accordance with the collective agreement. The third step of the grievance procedure involves a meeting between the company and the local grievance committee, and it was at this meeting that Elliott became aware of a number of problems with the grievor's position. As has already been mentioned, the grievor had a long, and poor, record which was marked by excessive amounts of absenteeism; moreover, the company took the position that the correspondence between the grievor's days "off sick" and the application for his business licence and the start up of his business were not merely coincidental. The company referred to, and relied upon, the previous posting of his business card.



Furthermore, Elliott was aware that a member of the grievance committee had tried, on several occasions, to reach Lazarou by telephone and had even visited his home, without success, during the period when Lazarou said he was bedridden. Elliott was also advised that Lazarou had failed to appear at a previously scheduled meeting between the company and the union in order to discuss his attendance record; and, further, that his continual tardiness was causing difficulties because the employer runs a continuous production operation and other members of the bargaining unit had to fill in when Lazarou was unaccountably ill or late.

12. Despite these difficulties, and the view of the grievance committee that the grievance was without merit, Elliott did not settle. He telephoned Lazarou, told him that there were problems with his version of events, and asked him to furnish more evidence. Lazarou produced an inconclusive doctor's letter. Elliott then arranged to discuss the matter further with Bill Knox, an official of the company. At that meeting Knox revealed, for the first time, the private investigator's report and communicated the company's view that the evidence demonstrated, unequivocally, that the grievor was fraudulently abusing sick leave. Following this meeting Elliott advised Lazarou that in the circumstances the union could not proceed to arbitration since the company's case seemed insurmountable. He advised Lazarou that he could appeal this decision to the executive board of the local union or, alternatively, there might be some remedy available from the Ministry of Labour. He did not advise Lazarou of all the details of the "evidence" which the company had gathered, but he did indicate that Lazarou had been followed and that the evidence of the local union officials (who, it will be recalled, attempted to reach Lazarou without success) merely corroborated that of the private investigator. A letter confirming this decision was mailed on or about 14th December, 1978. Lazarou denies ever receiving this letter. Although the return address is imprinted on the envelope it has never been returned. After about December 14th, 1978 Elliott maintains that he had no communication with Lazarou until the filing of the present complaint. Elliott testified, and we unequivocally accept, that he had no personal animosity towards the complaint and that the union has in the past handled a number of his grievances – some successfully and some unsuccessfully.

13. The obligation of a trade union to process the grievances of employees in the bargaining unit was discussed by the Board in *Douglas Aircraft Canada Ltd.*, [1979] OLRB Rep. Aug. 745 at p. 747, as follows:

"7. Section 60 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances, but it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, but in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official – especially an elected one – cannot be expected to exhibit the skills, ability, training and judgment of a lawyer. Union officials are entitled to make honest mistakes.



8. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interest of both parties to seek an "out of court" settlement which is more modest than either might have obtained had it been entirely successful before the adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation. The generosity of the settlement will depend upon the skills of the negotiating parties, the merits of the claim, the cost of the litigation process and the degree of "downside risk", i.e., the long-term ramifications of an adverse judgment. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is one important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. The relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial, nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the profitability of the enterprise and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive collective bargaining relationship depends upon the development of a spirit of compromise and co-operation. Regardless of the importance of any particular grievance, it will inevitably be only one of many (perhaps thousands) which the parties will be required to resolve during the currency of their relationship. It is in this context that the grievance procedure must be viewed. If either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials spend needless hours discussing inconsequential or ill-founded grievances. Moreover, as a practical matter, a rigid insistence on one's 'strict legal rights' is likely to provoke a response in kind, and yield only short term gains.

The purpose of the grievance procedure is to resolve disputes *prior* to arbitration. A trade union does not contravene section 60 simply because it settles cases which it believes to be without merit. As a matter of good judgment, and in the interests of sound industrial relations, it usually *should* settle such cases.

14. Has the trade union breached its obligation in the present case. We are unanimously of the view that it has not. The evidence is that Mr. Elliott accepted the grievance, reviewed the grievor's evidence and relevant documents, met with the grievance committee, spoke to the grievor to secure more evidence, met with the company and decided, on the basis of the information then made available, that Mr. Lazarou's grievance was unlikely to suc-

ceed and should be withdrawn. Subsequently Mr. Elliott advised the grievor of this decision and advised him of the avenues of appeal. There is no evidence whatsoever of discrimination or bad faith; nor was the trade union's conduct arbitrary. There is no doubt that the trade union officials applied their minds to the grievor's case and had a reasonable belief for believing that the facts adverse to the grievor's position were true. They based their decision on that belief. In view of the grievor's previous record of misconduct and the unsuccessful application of corrective discipline, the company clearly had a strong *prima facie* case for discharge – a case which an arbitrator was likely to sustain unless there was a consistent, detailed and credible explanation from the grievor to rebut the damaging evidence against him, or strong mitigating circumstances which might prompt an arbitrator to modify the severity of the penalty. The grievor was able to advance neither. In the circumstances the trade union was entitled to withdraw the grievance and in refusing to proceed further it was not breaching its section 60 obligation.

15. The complaint is therefore dismissed.

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**1975-78-R Office and Professional Employees International Union, Applicant, v. United Community Fund of Greater Toronto, Respondent.**

**Employee – Typing termination notices and employee appraisals – Employer intending to place employee in question on company bargaining committee – Whether excluded under section 1(3)(b)**

**BEFORE:** R. O. MacDowell, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

**DECISION OF THE BOARD;** December 28, 1979

1. This is an application for certification.

2. When this matter first came on for a hearing before the Board there was a dispute concerning the composition of the bargaining unit; however, the Board determined that the resolution of that dispute could not affect the applicant's right to certification. The Board appointed Ms. J. Grimwood, Labour Relations Officer, to meet with the parties in an attempt to affect a settlement of the matters in dispute and, if necessary, to inquire into the duties and responsibilities of the person occupying the position of "*administrative secretary to the executive director.*" At the commencement of that meeting both parties advised the officer that they had agreed to exclude the classification of *administrative secretary to the executive director* from the bargaining unit, and further advised that it was the *administrative secretary to the office manager* which was the classification in dispute. In its decision dated March 21, 1979, the Board had incorrectly recorded the agreement of the parties in this regard. In any event, the only outstanding issue is the status of Ms. Olga Dominico, the incumbent in the classification of *administrative secretary to the office manager*. The respondent contends that on the date that the certification application (i.e., February 28, 1979) Ms. Dominico was employed in a confidential capacity in matters relating to labour relations and

should be excluded from the unit pursuant to the provisions of section 1(3)(b) of *The Labour Relations Act*. Section 1(3)(b) of the Act provides as follows:

“Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

3. The purpose of section 1(3)(b) of the Act is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest, as between their responsibilities and obligations as persons who “exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations” and their responsibilities and obligations as members of the unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests, objectives and priorities are often divergent. Persons employed in a confidential capacity relating to labour relations are regularly involved with information and matters which, if disclosed, would adversely affect the collective bargaining interests of the employer. Section 1(3)(b) ensures that the employer need not be concerned that such persons will have “divided loyalties.”

4. Section 1(3)(b) involves three separate criteria: the disputed individual must be employed in a confidential capacity; the material with which that individual works must be confidential; and the material must be related to labour relations. The Board summarized its approach to these criteria in *York University*, [1975 OLRB Rep. Dec. 945 at page 951:

“... the Board must be satisfied of ‘a regular, material involvement in matters relating to labour relations’ to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed ‘confidential’ in the sense that the employer would not approve of disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case [1974] OLRB Rep. May 291). The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee’s service to the employer’s enterprise. (See, *The Toledo Scale Division of Reliance Electric Limited* case [1974] OLRB Rep. June 406).

5. The handling of collective bargaining information must be at the core of the disputed individual’s job functions. An occasional or peripheral involvement is insufficient to justify his exclusion. As the Board observed in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:



“A person to be excluded under this provision must be employed ‘in a confidential capacity’, i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

The application of this “test” to the facts in *Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831 prompted the Board to reach the following conclusion:

“While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent’s industrial relations strategy, and the Board must conclude that these employees are not employed in confidential capacity in matters relating to labour relations.”

6. It is also necessary that the information with which the disputed employee works is “confidential” so that its disclosure would undermine the employer’s industrial relations position vis-a-vis his employee(s). In *Holophane Co. Ltd.*, [1972] OLRB Rep. Dec. 999 the Board found that a switchboard operator, who had access to the absenteeism and disciplinary records of employees was not employed in a “confidential capacity” because the employees knew, or should have known, the contents of those records. And in *Daal Specialties Ltd.*, [1973] OLRB Rep. Nov. 592, the Board concluded that a switchboard-receptionist who types replies to grievances was not employed in a confidential capacity since these replies were obviously known to trade union officials to whom they were sent and were in no sense “confidential.”

7. In the present case the evidence is clear that although Ms. Dominico collects and collates certain information this information is not confidential but is freely available to the employees concerned. It is the employees themselves who fill in their attendance sheets. Ms. Dominico simply keeps a record so that they can be double checked. While she types termination notices and performance appraisals, the former are given to the employees only after an employee interview, and the latter are given to employees, and discussed with management as a matter of course. Ms. Dominico herself has no involvement in the process. Ms. Dominico could not recall typing any confidential memoranda concerning labour relations nor, she said, was there anything in the personnel records to which she had access which the employees did not already know. She has no involvement in preparing the budget and does not attend meetings of management. She testified that she learned of an employee’s termination and/or change in pay rate only after the fact. She had no advance knowledge of these matters, nor was she aware, in advance, of impending lay-offs or non-disciplinary termina-

tions. While at one point in her evidence she recalled typing a “pull up your socks” memo which she thought was then given to an employee; at another point she indicated that her files did not contain records or warnings or reprimands. No doubt the records are generally considered “private”, and the mass of bargaining unit employees do not have free access to the personal information of their fellow employees; however, such information is not confidential in the sense required by section 1(3)(b) nor was there any clear connection between the information to which Ms. Dominico has access and the collective bargaining process. There is no evidence, for example, that Ms. Dominico would be involved in formulating employer’s collective bargaining strategy or developing its response to grievances alleging a violation of the collective agreement. Indeed, her primary connection with labour relations matters seems to be typing material or facilitating communication of information to the employee or employees concerned. We are not satisfied, on the basis of the evidence before us, that Ms. Dominico falls within the exclusion set out in section 1(3)(b) of the Act.

8. Before leaving this matter we wish to note the comments of counsel for the respondent that the employer intends to make use of Ms. Dominico as part of the negotiating committee in forthcoming negotiations with the trade union. While such might well be the case, the Board cannot rest its determination on the basis of duties and responsibilities which an employee may exercise at some point in the future. The Board is restricted to the evidence disclosed in the Labour Relations Officer’s report and should there be a material change in an employee’s duties and responsibilities either party is entitled to make application under section 95 of *The Labour Relations Act* for a clarification of an employee’s status (in this regard see the decision of the Board in *Transit Windsor*, [1979] OLRB Rep. March 262.) We should repeat, however, that a collective bargaining role must be at the core of the employee’s job responsibilities. One cannot multiply the number of employee exclusions by “sprinkling” confidential functions among them or needlessly multiplying the number of participants in the bargaining process.

9. Having regard to the foregoing, the Board finds the following bargaining unit to be appropriate for collective bargaining:

“all office, technical and clerical employees of the respondent in Metropolitan Toronto, save and except accountant, administrative assistant to the executive director, administrative secretary to the executive director, supervisors, office manager and persons above the rank of office manager.”

The Board further notes, and repeats, the finding concerning the union membership of the Board contained in paragraph 5 of the decision dated 21st March, 1979.

10. A formal certificate will issue with respect to the above noted bargaining unit.

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**0261-79-U Thomas W. Langford, Complainant, v. W. C. Wood Company Limited, Respondent.**

**Discharge for Union Activity – Employer alleging discharge caused by grievor's confrontation tactics – Grievor known supporter of trade union movement – No active trade union activity on employer's premises – Complaint dismissed.**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and W. Gibson.

**APPEARANCES:** *M. Swenarchuk and T. W. Langford for the complainant; J. C. Murray and John Wood for the respondent.*

**DECISION OF THE BOARD; December 12, 1979**

1. The complainant has complained to the Board that he has been dealt with by the respondent contrary to the provisions of sections 58 and 61 of *The Labour Relations Act*. The complainant requested that he be reinstated to the position of set-up man and operator of three stage vacuum thermo former in the plastics department with full compensation for the monies lost. The complainant alleged that Pat Grecco, the industrial relations manager, had dismissed him for exercising his rights under *The Labour Relations Act*.

2. In its reply the respondent denied the allegations contained in the complaint and put the complainant to the strict proof thereof. In addition, the respondent adopted the position that the complainant had not complied with section 47 of the Board's Rules of Procedure and further submitted that the complaint on its face did not disclose any case supporting the remedy requested. The respondent requested the Board to dismiss the complaint.

3. At the hearing the Board ruled that it would not dismiss the complaint. The Board, however, directed the complainant to file particulars of its allegations. In response to the Board's direction, the complainant filed the following particulars:

- 1) At labour/management committee in March or April (date not known to us) John Wood stated that Tom Langford is a communist union organizer, stated to members of the labour/management committee, probably in plant 1.
- 2) On March 6, John Laperriere had an argument with foreman Bill Ray, at approximately 9:00 a.m. inside plant 2 regarding coffee breaks.
- 3) On March 7, Keith Parkinson spoke to John Wood in Plant 1 in the morning about conditions in the plastics department. (Don't know more details).
- 4) On March 7, Pat Greco informed Tom Langford at 4:00 in his office that he was transferred, contrary to s. 58 and s. 3 of the O.L.R. Act.
- 5) On March 8/79, at 7:10-8:00 a.m., John Wood spoke to Tom Langford in his office, and offered to find him a job in a union plant.



- 6) On March 8, at approximately 8:20, John Wood stopped the production line in Plant 1 and spoke to all the employees on the line, stating reasons for transferring Tom Langford; i.e. a personality conflict with the foreman.
- 7) At 20 minutes to 4:00 p.m., on March 8/79, John Wood held a meeting in the plastics department, telling members of day shift and some members of the evening shift that Wood's employees were better off without a union.
- 8) In November 1978, John Wood held a meeting in the Plant 1 cafeteria at approximately 4:00-4:35, and explained that company employees were better off without a union. Approximately 250 employees attended the meeting. Don't know day.
- 9) On March 12, in the presence of Terry Cousineau, at 9:25 a.m., Pat Greco dismissed Langford for engaging in his right under the Act, contrary to section 58 and s. 3 of the OLRA.
- 10) Tom Langford's activities exercising rights under the Act:
  - 1) frequent discussions in the plastic department about the possibility of organizing particularly from September '78 to Mar. 12, 1979, at lunch times before and after work with other employees in the department.
  - 2) obtained a leave of absence on Oct./14/76 to observe Day of Protest.
  - 3) circulated a petition in Oct./76 regarding safety conditions in the plant.
  - 4) on November 29, 1977, John Wood had a discussion with Tom Langford regarding a history of the 1959 strike, which had been distributed at the plant, informing him that if he handed out any more material in the plant he would be dismissed. Discussion was in the company boardroom [sic].
  - 5) at the November 78 meeting at which John Wood spoke to employees, Tom Langford asked a question about wages being paid, and at noon that day, participated in a discussion with other workers in which they planned other questions to be asked. John Wood, in his reply, said labour management committee did better than union plants do.
  - 6) during February/79, employees approached Langford to run for the labour/management committee. Employees included Dave Crowley."

4. The complainant commenced his employment with the respondent on January 28, 1976. His initial rate was \$5.39 an hour plus a bonus. On March 12, 1979, the date on which the complainant's employment was terminated, his rate was \$6.70 an hour with no bonus.

5. The complainant has referred to three sections of *The Labour Relations Act* in his complaint and particulars. Section 3 is in the nature of a declaration of rights and does not in itself create an offence. See the *Mrs. Deborah Brown, Mr. Stephen Lewis* case, [1976] OLRB Rep. Feb. 4, and the *Winson Construction Limited* case, [1976] OLRB Rep. Nov. 714. This complaint in so far as it relates to section 3 is dismissed. Section 58 prohibits employers from interfering with employees' rights and section 61 prohibits an employer from seeking by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade or to refrain from exercising any other rights under the Act. This complaint would succeed in the event that the Board is satisfied that the respondent in its dealings with the complainant has violated either section 58 or section 61 of the Act.

6. During the early part of March of this year the complainant was working in the plastics department. The foreman in the plastics department in March of this year was Bill Ray. At that time the complainant and Mr. Ray became involved in a dispute over whether or not the employees in the plastics department were entitled to take coffee breaks. The question of coffee breaks was not merely a private dispute between the complainant and Mr. Ray. The dispute produced loud arguments and other employees in the plastics department and the respondent's management became aware of the dispute. Towards the end of the day shift on March 7, 1979, the complainant was called to the office of Pat Grecco, the respondent's industrial relations manager, and informed that he was being transferred from the plastics department, which was in Plant No. 2, to a job on an assembly line in Plant No. 1. He was informed that he would be commencing his new job the following morning.

7. As the respondent's employees were reporting for work on the morning of March 8, 1979, the following bulletin was handed out free of charge to them. The bulletin reads as follows:

#### "GUELPH NEWS SERVICE

#### BULLETIN

#### JOHN WOODS ACTS LIKE HE OWNS THE W.C. WOOD CO. OR SOMETHING

GNS. March 8: On Wednesday of this week, just yesterday, a young worker from the W.C. Wood Co. came to see us with a distressing story. This young man has given us information before about the vicious working conditions and arbitrary management practices at the Wood Co. We've heard the same stories from other workers too who are or have been employed at the Wood Co.

Our response to hearing the story yesterday was to react with anger, as usual, and to more or less say: Yes, well life's tough under capitalism. That's why we're opposed to this system.

The young Wood Co. worker agreed but was dissatisfied with our response because it was too general and did not give a serious answer to his agitation over his specific problem yesterday. He said: "Well, I want change. I'm always telling people we need change. Some agree. Some are cynical. But they all say, it's easy for you to give advice to others who have problems 'but we'll see when it comes down to trouble for you.' Now it has come down to me and I'm really pissed-off because when push comes to shove, the company can do what they want with you. You can't do a thing about it."

"Wanna bet?" we answered – the enthusiasm to challenge the false might of John Wood was contagious.

We told the young Wood Co. worker that he could do something to fight back. We told him we could at least inform people of the situation by preparing a leaflet about his problem and giving it out at the Wood Co.

"That would be great", he responded. "I'm not suffering the worst blow John Wood can hand out. Lots of other people have suffered a lot worse. They're always firing somebody without reason or giving suspensions. In fact, they've just fired five people in the past while. It's not my problem that's important. What's important is finding a way to slow down John Wood and his one-sided management practices. If you do this on my case, I bet you'll hear about a whole lot more cases. There's a big number of people who are forced to leave the Wood Co. who never get a chance to get a parting shot and there's even more who stay at the Wood Co. but get screwed around without any real way of fighting back."

Sounds kinda like a crusade or something, eh? Well, we are told that the popular feeling at the W.C. Wood Co. is against John Wood and his high handed management practices. We are told that a standard joke at the Wood Co. is made at the expense of John Wood when he tours one of the plants, all full of himself – the worker points at him and says: "Look at that guy. He acts like he thinks he owns the place or something."

It's a bandwagon alright and we figure it's a good one to jump on!

Ask for A trip to the Coffee Truck  
and the Wood Co. gives you a transfer!

GNS. March 8: A "problem" was solved this week under Foreman Bill Ray in Plant Two of the W. C. Wood Co. The "problem" was that some of the workers thought they could buy coffee for their breaks from the coffee truck outside the plant.

"No problem, they've been doing that for years," you say.

"Not so," says Bill Ray. "They have been doing it for years. But never mind that, it is a problem!"



The foreman forbids everybody in the Plastics Department who works the 10 hour day/4 day week, to go to the coffee truck. People objected. Bill Ray did not change the order. The labour representative felt it to be an unimportant matter and he avoided taking action.

There was a lot of talk protesting the foreman's decision and, on Wednesday morning, a young machine operator went over Bill Ray's head by carrying the general complaint to Plant Two supervisor, Cy MacDonald. The supervisor told this worker that he was just working out a policy on breaks and trips to the coffee truck. He further said it would be okay to inform the workers that they could go to the coffee truck as usual until the new policy was made known.

Trips to the coffee truck went on and so did other usual activities at Plant Two, except that John Wood, tucked away in his office in Plant One, got news of the controversy and made a top level decision. He decided that the young worker who had dared to speak the words of general protest should be punished as a trouble maker. He had Personnel Manager Pat Grecco call the young worker to the front offices at 3:45 p.m. and tell him he was to be transferred to Plant One effective Thursday morning at 7 a.m. The transfer involves a change from a Class D machine operator's job to a class 2 incentive job on a production line – a demotion and a drop in pay!

That's the story. What is to be done about it? We don't presume to be able to say beyond a lapse back to our general response: "That's why we're opposed to the capitalistic system."

The young W. C. Wood Co. worker was more specific, however. He said: "We should fight John Wood on every single arbitrary decision like this. We'll either win or we'll give him the scare of his life. Even that would be nice."

8. The respondent in turn handed the following letter to the complainant on March 8, 1979:

"March 8, 1979

Mr. Tom Langford,

Dear Mr. Langford:

SUBJECT: Guelph News Service Bulletin

On Wednesday, March 7th, as a result of a number of complaints from personnel in the Plastics Department, a decision was made to transfer you to another job within the company. It was felt that the personality conflict between you and the foreman had reached a level where the situation had to be defused.

If you felt that you had been discriminated against or unfairly treated, there was a grievance procedure outlined in the Employees Guidebook which would allow you to appeal the transfer. At the same time, however, it should be pointed out that the transfer was not likely to result in any loss of income, seniority or fringe benefits.

On Thursday morning, March 8th, the "Guelph News Service Bulletin" published an article relating to the Wednesday transfer. You admitted having contacted the "News Service" and providing them with the information involved. W. C. Wood Company can only conclude that it was done with the objective of embarrassing the company, undermining the labour management committee and downgrading the foreman you were working for.

It is your responsibility to see that this does not occur again and should a subsequent bulletin be issued regarding your relations with the company, we will be forced to take disciplinary action.

We have a grievance procedure which works, a Labour Management Committee which is dedicated to seeing that our employees are being treated fairly, and provisions for correcting errors when they occur. Leaflets or news handouts are not the way of improving the situation.

Yours truly,  
W.C. WOOD COMPANY LTD.,  
Patrick N. Grecco,  
Ind. Rel. Manager."

9. On March 12, 1979, the bulletin referred to in paragraph seven was again handed out to the respondent's employees as they arrived for work in the morning. On the back of this bulletin Mr. Grecco's letter to the complainant was reproduced together with the following additional statements:

"GNS. March 11: The young W. C. Wood Co. worker who was the subject of our bulletin on Thursday March 8, received the letter which is reproduced below that same day. This letter is the result of our action informing other workers of his suffering under the arbitrary practices of John Wood. Thursday's bulletin which we produced to make this young worker's case known is printed on the back of this bulletin. When we warned the young man that John Wood may well make good on his written threat of discipline and his spoken threat of "dismissal", the Wood Co. worker told us: "To me those threats are like waving a flag in front of a bull. He's threatening basic rights that I'm supposed to have and that I'll fight to have. It would be a flimsy firing anyway. I'd fight and he'd lose. I think he knows he'd be stupid to fire me - he's lost lots of Labour Board cases before. I don't think he's that full of himself but maybe he is."

10. On Monday, March 12, 1979, at approximately 9:30 a.m. the complainant was dismissed by Mr. Grecco on behalf of the respondent. This complaint was filed on May 8, 1979.

11. The complainant attended the University of Guelph before he commenced working for the respondent. A few months after the complainant started working for the respondent the federal government introduced its anti-inflation programme. The respondent in one of its news bulletins to the employees expressed frustration with the programme and analysed its effect. The respondent urged its employees to remain at work during the Day of Protest on October 14, 1976. However, the respondent indicated its willingness to work with employees who wished to take part in a constructive measure. The complainant requested a leave of absence for October 14, 1976. This request was granted and the complainant participated in the Day of Protest and marched in the parade of the Guelph Labour Council. The complainant was the only employee of the respondent who requested and received a leave of absence for October 14, 1976.

12. On October 4, 1976, the complainant initiated and circulated a petition to complain about fumes in the plastic department. He submitted the petition to his labour representative Keith Parkinson. Between November of 1976 and February of 1977 over one hundred employees were laid off. The complainant was most displeased with this lay-off. He testified that in August of 1976 the respondent had stated that there would not be a lay-off. He also testified that the lay-off was carried out without regard to the seniority of the employees. He gave evidence that at this point he contacted a union and asked their advice. The complainant informed the Board that the union advised him that strength was required in the plant and that because of the limits placed on wages by the anti-inflation legislation he should concentrate on building up a group of employees in the respondent. The complainant gave evidence that he returned from a lay-off in June of 1977 and tried to build up such a group.

13. In November of 1977 the complainant was involved in distributing on the respondent's premises copies of a weekly publication entitled "Alive Magazine". The issue in question is dated November 26, 1977. "Alive Magazine" styles itself on the front page as "Anti-imperialist cultural work in the spirit of Norman Bethune and Lu Hsun!" The Magazine contains articles on labour relations, articles on political, economic and social matters in the People's Republic of China, articles on Russian chauvinism and Russian and American imperialism and an article which is critical of Chiang Ching and the Gang of Four. However, some five and a half pages are taken up by an article entitled, "A History of The 1959 Strike at W. C. Wood Co. (Guelph)". On the day that this issue was handed out the complainant was told by his foreman that John Wood, the respondent's president and general manager, wanted to see him.

14. During this meeting Mr. Wood asked the complainant where he had obtained the magazine and stated that he wanted to tell him the respondent's side of the story. The two men entered into a general discussion about trade unions in general and about the trade union which had been the bargaining agent for the employees in 1959. The complainant testified that Mr. Wood referred to the article on the strike as a strange mixture of fact and fiction and that he did not like the analysis. The complainant informed the Board that about a week after his meeting with Mr. Wood, the latter called a meeting of the respondent's employees after work and that during that meeting discussed his recollections of the history of the strike and the 1977-78 wage packet.

15. The complainant testified that Mr. Wood told him during the meeting that if he handed out the issue again he would be subject to dismissal. At this point, the complainant



decided to take a much lower profile and not do it any more. In February or March of 1978 the complainant applied for a transfer to another job on the afternoon shift in order to increase his contact with employees. He was accepted for the new job which was on the afternoon shift. In the summer of 1978 Mr. Ray offered him a job as a lead hand on the afternoon shift. The complainant declined the offer of promotion and asked to return to the day shift. During that summer there was an influx of new employees and the complainant gave evidence that a big issue for him to raise was the question of health and safety of the employees. The complainant canvassed the views of various employees and informed the Board that, "We concluded we needed a union to protect us.". The complainant did not elaborate on this and there was no indication of who constituted the "we".

16. Towards the end of November of 1978 Mr. Wood called a meeting of employees in order to explain to the employees the new wage and fringe benefit package for 1979. It was Mr. Wood's practice to do this each year and about two hundred employees were in attendance at the meeting which was conducted after work. At these meetings the respondent handed out mimeographed sheets which set forth the total package for the employees in 1979 and compared the benefits to be received by the employees of the respondent with the benefits received by the employees of three other appliance manufacturers whose employees are represented in collective bargaining by trade unions. The complainant received notice of this meeting and decided that questions should be asked about the package. In order to prepare such questions the complainant spoke to Keith Parkinson, a labour representative, about the discussions with the respondent. The complainant and six or seven other employees prepared questions to be asked. Three questions were asked and the complainant asked one of the questions. The complainant informed the Board that the meeting was a good time to show that there were questions to be asked about the way the respondent was operated because two hundred employees were present.

17. The complainant gave evidence that he carried on his discussions with employees of the respondent about the need for a trade union for job security and health and safety. In January of 1979 the complainant's relationship with Mr. Ray started to deteriorate. The two men had disputes, among other things, about wash-up time and coffee breaks. These disputes degenerated into shouting matches which were witnessed by other employees in the plastics department. These disputes led to the respondent's decision to transfer the complainant from his job in the plastics department to a job on an assembly line in Plant No. 1. On March 7, 1979, Mr. Grecco informed the complainant at the time of his transfer that he was being transferred and that there was poor morale and poor group spirit in the plastics department. Mr. Grecco told the complainant that the respondent thought that the cause was a personality conflict between the complainant and Mr. Ray. The complainant objected to being transferred because in his own view he was not the cause of the problem and told Mr. Grecco that he did not like the finger pointed at him. Mr. Grecco replied that a finger was not being pointed at the complainant and that the respondent was trying to solve a problem.

18. Mr. Wood spoke to the complainant about the Guelph News Service's bulletin which was distributed on March 8, 1979. The meeting was held in Mr. Wood's office at 7:30 a.m. on March 8, 1979. At this meeting Mr. Wood reviewed the fact there was a complaint procedure in the respondent's Employees' Guide Book. He pointed out to the complainant that if he felt he was being unfairly treated he could review his complaint with his representative and the labour committee under a procedure which was well-established for amicably

solving problems in labour relations. Mr. Wood informed the complainant that he did not consider the bulletin of the Guelph News Service to be an appropriate way of resolving a problem or contributing to harmony or morale in the plant. Mr. Wood asked the complainant what was his attitude towards the respondent. The complainant indicated that he was pro-union. Mr. Wood replied that had nothing to do with it, that the respondent had a number of employees who were pro-union, that it was only to be expected and that it was their privilege. Mr. Wood pointed out that an employee's attitude towards a union was not relevant in hiring, promotions and transfers. Mr. Wood cited examples to the complainant of employees who were pro-union and who had nevertheless been promoted to foremen.

19. Mr. Wood explained the reason for the complainant's transfer as being to diffuse the situation in the plastics department and to give him a fresh start in another department working for another foreman. The complainant responded that he wanted his former job because the transfer was unfair. Mr. Wood then asked the complainant why he wanted to work for the respondent and whether he would not prefer work in a union shop in Guelph. The complainant replied that he wanted to work for the respondent. The meeting between the two men concluded with Mr. Wood remarking that there was a grievance procedure which the complainant could use but that if it was the complainant's objective to cause unrest, undermine the authority of his foreman and reduce morale in the plant the respondent felt this would be caused by further news bulletins. Mr. Wood pointed out that further news bulletins of this kind could result in his dismissal.

20. Subsequent to this meeting the complainant was taken to Plant No. 1 and introduced to the employees who were working there. These employees were assembled before Mr. Wood. He addressed the employees very briefly and explained that the complainant was being transferred to improve morale in the plastics department and that he would be working with them on the assembly line.

21. On March 12, 1979, the complainant's employment was terminated following the issue of the second bulletin from the Guelph News Service. The decision to terminate the complainant's employment was taken following a meeting of Mr. Wood, Mr. Grecco, Mr. Cousineau and Mr. MacDonald. They agreed that since Mr. Wood had spoken to the complainant and since he had received a warning letter from Mr. Grecco he knew the consequences of his conduct the respondent had no alternative but to dismiss him.

22. On March 12, 1979, the complainant submitted a grievance with respect to his transfer and on March 16, 1979, he filed a further grievance with respect to his termination. On March 21, 1979, the following letter was mailed to the complainant:

"Dear Mr. Langford:

This letter concerns your grievance submitted Friday, March 16, 1979.

In the Committee's review of all the facts in your case, it was apparent that you had deliberately chosen to ignore the letter of March 8, 1979.

The decision of the Labour Management Committee not to uphold your grievance was unanimous.

Yours truly,

W.C. WOOD COMPANY LTD.  
Patrick N. Grecco,  
Ind. Rel. Manager.”

23. In a letter dated March 27, 1979, the complainant wrote to Mr. Grecco and acknowledged receiving the letter dated March 21, 1979. In this letter the complainant requested that his grievance (presumably the grievance dated March 16, 1979) be submitted to arbitration according to section 16 of the Employees' Guide Book 1979. The complainant named his nominee as arbitration and asked that he be notified of the name and address of the respondent's nominee for arbitrator.

24. The following letter dated April 3, 1979, was sent to the complainant:

“Dear Mr. Langford:

In regard to your letter dated March 27, 1979.

The matter of arbitration rests with the Labour Committee and Management. Since the Labour Committee was unanimous in its decision not to uphold your grievance the matter will not proceed to arbitration.

Yours truly,  
W.C. WOOD COMPANY LTD.  
Patrick N. Grecco,  
Ind. Rel. Manager.

25. It is interesting to note that the complainant in his two grievances set forth at considerable length his belief in the reasons and merits for the transfer and termination by the respondent. At no point does either grievance refer to any rights that are protected by section 58 and 61 of the Act. There is no mention of membership in a trade union or of the activities of a trade union. Indeed, the Form 32, Complaint Under Section 79 of the Act, as originally filed does not refer to membership in a trade union or to activities on behalf of a trade union. It was not until June 1, 1979, when the Board directed the complainant to file particulars that references to “union organizer”, “union plant”, “union” and “unionizing” appeared for the first time.

26. The complainant took part in the Day of Protest on October 14, 1976; circulated a petition about conditions in the plant in October of 1976 and distributed in November of 1977 the issue of Alive Magazine which dealt with the strike in 1959. These incidents are argued as establishing knowledge of the complainant's union activity. Even assuming, without deciding, that such conduct is only referable to activities encompassed by sections 58 and 61 of the Act, there remains the fact that after these three incidents the respondent in the summer of 1978 offered the complainant a promotion to lead hand. Such conduct by the respondent does not, in our view, evidence any hostility towards the complainant and does not support the complainant's argument that the respondent held these activities against him. Whatever the respondent's interpretation of these activities by the complainant, there is no evidence that it penalized the complainant in any way.

27. The discussion between Mr. Wood and the complainant about the wage and



fringe benefit package for 1979 produced a comment by the former that the employees of the respondent were doing better than the employees in similar plants who were represented by trade unions. Mr. Wood was expressing an opinion and in the context of the conversation with the complainant such remarks are not a violation of sections 58 and 61.

28. The approach to the complainant to run for the labour/management committee in February of 1979 was relied on as supporting the complainant's contention that the respondent has violated section 58 and 61. There is no evidence before the Board that the respondent was aware of this. Moreover, if the respondent had been aware of this there is every indication that it would have encouraged the complainant's involvement. Mr. Wood clearly indicated to the respondent's employees that they should become active in the affairs of the labour/management committee.

29. Mr. Wood offered to try and find the complainant a job in a unionized plant in Guelph if that was what he wanted. The complainant declined this offer. Once again this remark must be considered in its context. The topic of trade unions was introduced into the conversation by the complainant. As indicated in paragraph 18, the complainant indicated that he was pro-union. Mr. Wood in exploring the complainant's attitude to the respondent offered to try and find him a job in a unionized plant in Guelph if he was not happy working for the respondent. The Board finds that this was an attempt by Mr. Wood to accommodate the complainant and such a response was in no way a violation of sections 58 and 61.

30. The most substantial particular filed by the complainant is the first claim set forth in paragraph three, namely, that, "At labour/management committee in March or April (date not known to us) John Wood stated that Tom Langford is a communist union organizer, stated to members of the labour/management committee, probably in plant 1." The evidence in support of this particular arises from the testimony of three employees, Dennis Dobberthien, Dwight Francis and Kenneth Picken.

31. It was the complainant's position that Mr. Dobberthien had spoken to Mr. Francis and Mr. Picken at fifteen minutes to six on Tuesday, May 29, 1979, before the commencement of work and that in that conversation Mr. Dobberthien had informed the other two men that at a meeting of the Labour Representatives Dal Pavy had said that Langford was a communist and that John Wood said that Tom was a communist union organizer who had dealings with a communist union. The complainant contended that Mr. Dobberthien had stated to Mr. Francis and Mr. Picken that John Wood had named a union and perhaps its initials but that Mr. Dobberthien agreed that part of this conversation had taken place but insisted that what he said was that Mr. Pavy had called the complainant's counsel a communist lawyer. Mr. Dobberthien denied making the statement as alleged by the complainant.

32. At this point the complainant sought to establish that Mr. Dobberthien was a hostile witness. The Board permitted the complainant to follow the procedure laid down by the Ontario Court of Appeal in *Wawanesa Mutual Insurance Co. v. Hanes* [1961] O.R. 495. The Board permitted a prior inconsistent statement which Mr. Dobberthien allegedly made to be introduced into evidence. Mr. Francis gave evidence of the statement. He testified during a meeting a quarter to six in the morning on May 29 among Mr. Dobberthien, Mr. Picken and himself, the subject of a labour relations meeting and the complainant's termination was raised. Mr. Francis gave evidence that at the meeting among the three men Mr. Dob-

berthien had said that Dal called Tom (the complainant) a communist and that John Wood stepped in and agreed with Dal that Tom was a communist organizer and had dealings to do with a communist union. Mr. Francis further testified that Mr. Dobberthien was going to name the union but could not remember the name of it. At this point the three men went to work. The Board subsequently declared Mr. Dobberthien a hostile witness and permitted the complainant to cross-examine him.

33. In cross-examination Mr. Dobberthien agreed that he probably said that Mr. Pavy called the complainant a communist but denied saying that Mr. Wood had called the complainant a “communist” and a “trade union organizer”. Mr. Dobberthien changed his testimony and agreed that the reference to a communist lawyer did not refer to the complainant’s counsel but did refer to the complainant’s nominee for a board of arbitration. He was unable to remember Mr. Wood making any comments on the complainant’s political or other affiliations or about calling the complainant a union organizer. Mr. Dobberthien gave evidence that the meeting of the labour committee continued after Mr. Wood had left and that the reference to the complainant upon which the complainant relies could have been made after Mr. Wood left the room.

34. There was a contradiction in the testimony of Mr. Francis. At one point he stated he was not surprised to hear the complainant referred to as a “communist union organizer” and at another part of his testimony he stated that the use of the word “communist” with respect to the complainant did surprise him. Kenneth Picken subsequently testified that Mr. Dobberthien had stated that at the labour committee meeting Mr. Wood had been present because someone had called the complainant a “communist union organizer”. It appears to the Board that there was an assumption made by Mr. Picken that the words “communist union organizer” were used and must have been used by Mr. Wood. Mr. Picken also testified that Mr. Dobberthien had said that Mr. Wood had referred to a trade union by the initials “UE” only to subsequently change his testimony and state that Mr. Dobberthien thought the initials used by Mr. Wood were “CE”.

35. It is quite clear that the recollections of Mr. Dobberthien, Mr. Francis and Mr. Picken vary in many critical areas. Mr. Dobberthien is not sure of what was said at the labour committee meeting but denies the remarks attributed to Mr. Wood. There is a contradiction in the testimony of Mr. Francis and Mr. Picken. On the basis of the uncertainty surrounding this hearsay evidence the Board is not prepared to find that Mr. Wood made the remarks attributed to him by the complainant.

36. There was also evidence introduced by the complainant that Mr. Wood had called the complainant a “communist”. This was initially the testimony of Armour O’Connell. However, in cross-examination Mr. O’Connell stated that he could not swear that Mr. Wood had either raised or commented on the complainant’s political affiliation. Another witness, John Laperriere also gave evidence that Mr. Wood had addressed certain employees about trade unions only to state subsequently that there had not been any discussions with any member of management about trade unions.

36. It may well be that the complainant was referred to as either a “communist” or a “communist union organizer”. The Board is not prepared on the evidence before it to find that Mr. Wood made these references to the complainant. It appears that Mr. Pavy may have referred to the complainant as a “communist” and that other employees may have held the same view.

38. The complainant argues that he was involved in trade union activity. By his own testimony he has contacted trade unions and endeavoured to interest them in organizing the respondent's employees. However, these trade unions, by the complainant's own admission, have not on their own behalf taken steps to organize the respondent's employees. The complainant testified that he has been talking to some of the respondent's employees about trade unions, especially the younger employees who were working in their first jobs. The complainant has not, however, formed a committee of employees for the purpose of organizing employees of the respondent, has not caused a constitution to be adopted, and has not signed any membership cards. The complainant's friend Mr. Picken testified that the complainant has introduced discussions about trade unions. The Board wonders where co-worker Laperriere was when this occurred because he testified that the complainant never indicated any involvement in any trade union. It appears to the Board that if the complainant held such discussions they were at an abstract or theoretical stage. Even assuming, without deciding, that such discussions fall within the conduct protected by sections 58 and 61, the Board finds no evidence that the respondent was either aware of this or acted upon it.

39. It appears to the Board that the complainant was involved in a policy of initiating and maintaining confrontation and tension between the respondent's employees on the one hand and the respondent and Mr. Wood on the other hand. The complainant admits that not all of the contents of the article on the strike in 1959 is true and that the statement "– he's lost lots of Labour Board cases before" is totally untrue. It is not surprising that Mr. Wood should want to put his version to the respondent's employees. It is not unreasonable that the respondent is not prepared to have its labour relations with one of its employees conducted through the Guelph News Service.

40. The complainant has endeavoured to provoke and belittle Mr. Wood and his father by a policy of confrontation. This is illustrated not only by articles in *Alive Magazine* and the *Guelph News Service* but also by the incident with the jacket. As part of the celebrations marking the respondent's fiftieth anniversary, the respondent's employees were offered a choice of either a jacket with a company insignia or a set of Canadian coins. The complainant removed the insignia from the jacket he had chosen and provoked Mr. Wood into losing his temper and calling him a liar. While Mr. Wood apologized for his behaviour, this incident illustrates, in our view, a successful attempt to provoke Mr. Wood to action.

41. In this complaint the Board is not called upon to determine whether there was just cause to transfer or terminate the complainant's employment. The Board is required to determine whether the respondent has violated section 58 or 61 of the Act. For the foregoing reasons, the Board finds that the respondent has not violated sections 58 and 61 of the Act and that the complainant was transferred and his employment terminated for the reasons and only for the reasons stated by the respondent.

42. The complaint of Thomas W. Langford is dismissed.

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**1622-79-R** Richard Kent, James Gilles and the Employees of Weston Bakeries Limited, London Branch, Applicants, v. Milk and Bread Drivers, Dairy Employees, Caterers, and Allied Employees, Local Union No. 647, Respondent, v. **Weston Bakeries Limited**, Intervener.

**Petition – Termination – Custody of petition not established from inception to filing – No suggestion of management involvement – Difference between termination and certification petitions considered**

**BEFORE:** M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

**APPEARANCES:** *Richard Kent and James Gillies for the applicants; Harold F. Caley and Frank Buck for the respondent; G. G. Smith for the intervener.*

**DECISION OF THE BOARD;** December 21, 1979

1. This is an application for a declaration terminating bargaining rights pursuant to section 49(2) of *The Labour Relations Act*. Mr. Richard Kent and Mr. James Gillies appeared before the Board and gave evidence in support of the application.

2. The evidence establishes that there was some general dissatisfaction amongst the employees in the bargaining unit with the representation being given by the respondent trade union. The matter of possible decertification was discussed amongst employees during the summer of 1979, and Messrs. Kent and Gilles jointly went about finding out how such could be accomplished. Both individuals are employed at the company as route servicemen, and Mr. Kent is presently the shop steward. The evidence leaves little doubt that the applicants received advice and assistance in their endeavours from the Retail, Wholesale and Department Store Union.

3. The heading for the petition was typed by Mr. Kent, and at a meeting of the employees at an employee's house on November 7, 1979, a secret ballot was held on the question of decertification of the respondent trade union. The vote was heavily in favour of decertification, and all 15 of the employees present at the meeting then signed the petition in the presence of Mr. Kent and Mr. Gillies. Mr. Kent signed two more employees at work the next day prior to the employees reporting to their trucks. There was no direct evidence presented to the Board with respect to the two remaining signatures on the petition, hence the Board disregards those signatures. The petition was given to another employee for the purpose of obtaining these last two signatures, and the petition was out of the custody of Messrs. Kent and Gillies at least during that period of time (one or two days). When Mr. Kent received the petition back from this employee, he attended at the London office of the Retail, Wholesale and Department Store Union and left with them the Application For Declaration Terminating Bargaining Rights (Form 13) signed in blank, together with the information which he wished to go on it. It is not clear from the evidence whether Mr. Kent left the petition itself with the Retail, Wholesale and Department Store Union or not. About a week later Mr. Gillies was given the petition by Mr. Kent and the application by a representative of the Retail, Wholesale and Department Store Union, and Mr. Gillies mailed both to the Labour Board.

4. The respondent trade union challenges this application on the basis that the evidence does not establish the custody of the petition from the time of its inception until its receipt by the Board. In this regard, the respondent relies upon *CCH Canadian Ltd.*, [1975] OLRB Rep. Jan. 19 especially para. 10; *Mac-Wood Machine Ltd.*, [1975] OLRB Rep. Nov. 842; *Extruded Plastic Products Ltd.*, [1972] OLRB Rep. Mar. 268; *Willow Press*, [1971] OLRB Rep. Feb. 59 and *Vered & Harvey Ltd.*, [1971] OLRB Rep. Nov. 736.

5. In this case, however, there is no suggestion that the petition may have at some point fallen into the hands of management. The Board notes as well that the “deficiencies” in the evidence with respect to the matter of custody occur subsequent to the obtaining of all the signatures on which the Board is relying, and the evidence does not disclose that the petition was being handled so loosely as to have given employees the impression that it might at some point come to the eye of management. (Compare the *Extruded Plastics Products Ltd.* and *Vered & Harvey* cases, *supra*.) In the *Mac-Wood Machine Ltd.* case, the missing links involved a person standing in a special relationship to the owner and plant manager, clearly causing the Board in that case to be concerned over the mere possibility of managerial involvement. This was true, to some extent, in the *Willow Press* case as well. Both cases also involved an application for certification, not termination of bargaining rights (for the difference in burden of proof imposed by the Board, see *Northern Telecom*, [1979] OLRB Rep. April 330).

6. It may well be, as the respondent trade union urges, that the petition was left in the custody of the Retail, Wholesale and Department Store Union while the application itself was being prepared. However, this itself hardly provides evidence of a link with management, or a perceived link with management, which is the focal point of the Board’s concern in these matters. As stated in the *CCH Canadian Ltd.* case, *supra*, the omissions of concern to the Board are those which “inevitably raise questions which detract from the weight to be given to the petitions as being originated by the employees and expressing the voluntary wishes of the signatories”.

7. The respondent trade union further submits that the evidence of the petitioners, and in particular the contradictory evidence of Mr. Kent, is so unreliable as to cause the Board to give no weight to the petition. See *UBA Chemical Industries*, [1975] OLRB Rep. March 198, para. 20; *Secord Mfg. Ltd.*, [1975] OLRB Rep. Sept. 658; *Willow Press*, *supra*; *N. Weingarten*, [1969] OLRB Rep. Oct. 849, para. 5. Given the short period of time which has elapsed between the date of the hearing and the events testified to, the Board must conclude, as counsel for the respondent urges, that Mr. Kent, for whatever reason, did in fact attempt initially to suppress the role played by the Retail, Wholesale and Department Store Union in this application. While such an assessment might well be fatal to the application had Mr. Kent’s evidence been contradicted on other material points, the Board remains satisfied on the basis of all the evidence before it, and in particular the evidence of Mr. Gillies, that the petition in support of the application represents a voluntary expression by the employees in the bargaining unit, free from any management influence or support. The obvious role played by the Retail, Wholesale and Department Store Union in this case is simply not material to that conclusion.

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9. The Board directs that a representation vote be taken of the employees of the intervenor.

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11. The matter is referred to the Registrar.
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**0910-79-U Oil, Chemical and Atomic Workers International Union,  
Complainant, v. Wyeth Ltd. Respondent.**

**Discharge for Union Activity – Employer removing vocal union supporters from unit after union losing certification vote – Employer lawfully communicating with employees during campaign – Board directing employer to distribute Board’s decision ordering reinstatement of grievors**

**BEFORE:** R.O. MacDowell, Vice-Chairman and Board Members C.A. Ballentine and C.G. Bourne

**APPEARANCES:** *Larry Gauthier, Stephen Krashinsky and John More for the complainant; Charles F. Clark and Keith Long for the respondent.*

**DECISION OF THE BOARD;** December 6, 1979

1. This is an application under section 79 of *The Labour Relations Act*. The complainant charges that the respondent had dealt with the grievors Ann Marie McMahon and Gail Ouellette contrary to sections 56, 58, 61 and 71 of the Act. It is alleged that the employer has engaged in a concerted campaign of harassment designed to penalize the grievors for their trade union activity and force them to quit. It is further alleged that this campaign culminated in the illegal discharge of Gail Ouellette on October 26th, 1979.

2. On September 10th and October 31st, 1979 the Board conducted hearings to entertain the evidence and submissions of the parties with respect to the union’s allegations. Much of the employer conduct was either admitted or not seriously in dispute. There were, however, some significant differences between the respondent’s evidence and that of the complainant’s witnesses. Our findings of fact, as set out hereunder, reflect our assessment of the totality of the evidence, the relative credibility of the various witnesses, and the reliability of their recollection of events. In particular, having regard to the demeanour of the various witnesses and the pattern of their responses in direct and cross examination, we are prepared to accept the evidence of the grievors wherever there is a conflict between their evidence and that of the respondent’s witnesses.

3. In or about January, 1979 the complainant trade union began to organize the respondent’s employees. An application for certification, requesting a representation vote, was made on January 26, 1979. A vote was conducted on March 15th. The grievors were active union supporters who solicited membership on behalf of the union. We are satisfied that at all material times the employer was aware of the grievors’ trade union activities.

4. Between January 26, 1979 and March 15, the date on which the vote was held, the employer conducted a carefully orchestrated campaign in opposition to the union. This



strategy included posters, personal letters addressed to employees, a number of meetings held on company premises which employees were compelled to attend, and at least one meeting held at a local hotel. Meanwhile, the grievors and other union adherents urged their fellow employees to support the union. The company's campaign gave rise to charges pursuant to section 7a of the Act which were dismissed, following a hearing before the Board on May 8, 1979. The grievors were subpoenaed as union witnesses and although they were not called, were clearly identified with the union's cause.

5. The representation vote itself was relatively close: of the forty-seven individuals voting, twenty voted in favour of the union and twenty-seven voted against the union. Although this was not sufficient to justify its certification, the voting results did reveal that the union had a substantial core of support. By a decision dated August 23, 1979 the Board dismissed the application for certification and ruled that there could be no new application for a period of six months. It should be observed, however, that if the union were able to maintain its demonstrated level of support it would immediately be entitled to a new representation vote; and, if it were able to recruit six to eight new supporters from among those who had voted against it, it might become entitled to certification without recourse to a representation vote. The company's "non-union" position would be more secure if vocal union supporters could be silenced or removed.

6. Gail Ouellette and Ann Marie McMahon have been employed by the company for six years and four years respectively. They were apparently considered good employees and had been complimented, from time to time, on their work. Apart from a trivial incident involving McMahon in late 1978, neither of the employees has any record of past misconduct or discipline. Prior to their involvement with the trade union, neither has ever been formally warned, suspended or threatened with discharge. They had never been reproached about their punctuality, their level of absenteeism or the quality of their work. There were occasional disagreements between Gail Ouellette and Mrs. Anderson, her immediate supervisor. Mrs. Anderson was relatively new to the organization and was undoubtedly anxious to establish her supervisory authority. Ms. Ouellette was by this time thoroughly familiar with all aspects of her job and may well have resented having to follow the instructions of someone less knowledgeable than herself about the requirements of the job. However, both individuals testified that prior to the union's organizing campaign their relationship was a fairly good one and, despite occasional friction, they were able to resolve their differences amicably.

7. Following the grievors' involvement with the trade union and, especially following their appearance as union witnesses at the hearing on May 8th, there was a change in the management attitude towards them. Their work began to be closely monitored and Mrs. Anderson became increasingly critical. The employees were plagued by a series of enquiries concerning their work habits. Such enquiries were obviously, and in our view intentionally, provocative. On one occasion, for example, when Ouellette was required to take time off from work to take her daughter to a doctor, it was suggested that if her daughter's health was more important than her job she could be replaced. When the employees became irritated and responded in kind, they were accused of insubordination or of "exhibiting a poor attitude." Anderson repeatedly suggested to the grievors that they seek employment elsewhere if they were dissatisfied with the atmosphere at work. In our view it is no coincidence that this change in managerial attitude dates from the grievors' involvement with the trade union's organizing campaign; nor was the grievors' union affiliation absent from Anderson's

mind. On one occasion Anderson pointedly told the grievors that her brother had been involved in an unsuccessful trade union organizing campaign and had subsequently been forced to leave his job. On other occasions Anderson told the grievors that Keith Long (the company's personnel manager) was "watching every move" the grievors made, was "going to make it hard" for them, was "trying to get something on them" and wanted the grievors fired before the next union attempt to organize. Anderson apparently felt herself to be under pressure. She warned the grievors to be especially careful not to provide Long with any excuse so that: "he will get off my back."

8. The union alleges a discriminatory, coercive and punitive application of the company's rules. It is argued that the grievors have been singled out because of their trade union activity and that their alleged misconduct was a mere pretext designed to mask an anti-union motivation. It is necessary, therefore, to refer briefly to the company's rules and the way in which they have been applied to the grievors. Before doing so, however, we wish to make it clear that nothing in *The Labour Relations Act* prevents an employer from promulgating rules respecting its employees, nor does this Board have any jurisdiction to interfere with employer practices which we might consider arbitrary or unfair. An employer is entitled to run its business in its own way, so long as, in so doing, it is not motivated by anti-union considerations. Of course, if an employer engages in conduct which appears to be arbitrary, discriminatory, inconsistent or unreasonable, this may provide some evidence of an anti-union animus; however, unfairness *per se* is not the issue. We also wish to observe that opposition to a trade union is neither unusual nor, in itself, illegal; and, further, that an unsuccessful union organizing campaign may well prompt an employer to re-examine its personnel policies and institute changes in its approach. The fact that it has done so does not, standing by itself, demonstrate that an employer has acted illegally when its new policy is subsequently applied to individual employees. The issue is whether the employer's conduct was motivated by *bona fide* business considerations or, alternatively, was intended to penalize employees who have exercised their rights under the Act, or induce other employees to refrain from doing so.

9. In May the grievors were both given a written warning – McMahon for refusing to carry a box containing eight-thousand sheets of zerox paper and Ouellette for supporting McMahon, pointing out that this was not part of her job and arguing with her supervisor. The evidence is uncontradicted that McMahon had a back injury which might be aggravated by carrying heavy boxes, that her supervisor was aware of this injury and that it was specifically adverted to at the time. The evidence is also uncontradicted that carrying paper was not a normal part of McMahon's job and that she was not usually disobedient. Ouellette was suspended on or about September 6th, 1979 for "insubordination" which, again, consisted of arguing with Anderson. There is no doubt that this argument took place and may well have been heated at times. Ouellette freely admitted this in her evidence. However, it is also crystal clear that Ouellette's response was motivated, at least in part, by the pattern of hyper critical supervision to which she had been subjected. Ouellette believed that she was being singled out and reprimanded for activities in which other employees frequently engaged, or for conduct which was in no way improper.

10. In her evidence Anderson indicated that she was concerned about Ouellette's tardiness and record of absenteeism; but there is no evidence that Ouellette was abusing sick leave, there is no allegation that she ever failed to notify Anderson when she would be late for work and she never refused to produce a doctor's note when requested to do so. There is



no suggestion that the grievors ever failed to fill in the proper lost time documents or improperly claimed wages. Anderson had considerable suspicions concerning doctor's notes and doctors in general but, on cross-examination, she admitted that it was reasonable to be absent on account of illness, she had no reason to question the propriety of the doctor's notes, and had never actually done so. It is significant that none of the other employees have been required to produce such documentation, nor was there any evidence that other employees had been criticized for their tardiness or the length of their coffee breaks, even though the uncontradicted evidence is that other employees were occasionally absent, late or took extended breaks. Indeed, although much was made of the grievors' conduct before this Board, Long testified that when considering whether to discharge Ouellette these matters were not even considered. On cross-examination, none of the management witnesses was prepared to say that the grievor's record of absenteeism, illness, tardiness, etc. was worse than that of other employees. It would appear, therefore, that Ouellette's perception of the situation, and her consequent irritation, were both justified.

11. In cross-examination Long maintained that there had been no change in the company's rules following the union's organization drive, yet earlier he identified two new notices which the company had posted setting out specific rules regarding punctuality, medical appointments and lost time reporting. Long also testified that the company had an established practice of issuing written warnings and that the discharge of an employee was not extraordinary. When pressed, however, it became evident that the company had not issued a written warning in six years, and some of the written warnings to which he referred (and which were produced for the Board as exhibit #13) dated back to 1956. Long also admitted that none of the bargaining unit employees had recently been discharged. Accordingly, the Board is satisfied that the discipline of the grievors, and especially Ouellette, was an unusual event and a marked departure from the company's previous approach to such matters. In her evidence Anderson characterized all of these matters as *new* company practices. Anderson admitted that she was enforcing the rules more vigorously than before – at least in so far as the grievors were concerned. She began keeping notes on the grievors' behaviour and evidently communicated such information to Long. No notes were kept on other employees. It would appear that the stringent application of the rules was reserved for the grievors.

12. In his evidence Long indicated that he had considerable experience as a personnel manager and was familiar with trade unions. The complainant is already the bargaining agent for the respondent's production employees. Long advised the Board that it was his practice to discuss problems with employees in an effort to resolve any difficulties which had arisen. No such discussions were held with Ouellette. The written warning, suspension and discharge were imposed, and approved by senior management, without ever discussing the matter with her or attempting to ascertain "her side of the story." Long allegedly concluded that she had an "incurable" attitude, but in reaching the decision that Ouellette must be discharged, Long testified that no consideration was given to her past good record, and he did not consider it necessary to raise the matter with her.

13. There were two incidents relied upon as justifying discharge. On or about October 25 the grievors had walked through an area of the company's premises through which employee traffic is generally prohibited. We are satisfied that a number of other employees, as well as the grievors, have done so on many occasions in the past, without reproach. The second incident arose the following day. Ouellette did not leave her work station at the usual time for her 15-minute afternoon coffee break but, rather, stayed at her machine for



an additional ten minutes to complete the job upon which she was working. She then took her break, returning fifteen or twenty minutes later. Upon her return Anderson questioned her about the reasons for her lateness. In her evidence Anderson at first testified that Ouellette had refused to give any reason for her late return but, upon cross-examination, Anderson admitted that Ouellette had explained the situation. Anderson was apparently not content with this explanation and continued to berate Ouellette for her tardiness. A short argument ensued, in which neither individual exhibited the tact and mutual respect which should characterise the employer/employee relationship. However, we are also satisfied that Ouellette's response was provoked by what she considered to be a pattern of abusive and belligerent behaviour – a belief which we are satisfied is not unreasonable in the circumstances. Other employees had not been cross-examined when they took a late break or came back a few minutes late, nor had this been a matter leading to discipline.

14. The Board notes that the discharge of Ouellette came between the first and second day of hearing in this matter, i.e., while the matter was pending before the Board. Anderson testified that the decision to discharge Ouellette was jointly taken by herself, Keith Long, D. Cooper and E. Pastorius. Although the Board was enquiring into the propriety of the company's previous treatment of the grievor, and the discharge would undoubtedly be raised at a continuation of the hearing, Anderson testified that during the meeting the subject of the proceeding before the Board, and the possible consequences of a discharge at that point in time, were never even mentioned. Of course, there is nothing improper in the employer's discussing the matter. Indeed one would expect it to do so. It is difficult for the Board to accept that the subject was never even raised.

15. Shortly before the second day of hearing McMahon quit. She advised the Board that management continued to be hostile and oppressive and that the friendly atmosphere which she had enjoyed for much of her four years with the company was gone. McMahon testified that the company was "making life miserable" for her and that she felt compelled to leave. Ouellette was fired the same day.

16. We do not accept the union's contention that the grievors were exemplary employees whose conduct was satisfactory in every respect. It is clear that some of the friction between Anderson and Ouellette results from the clash of personalities and is not directly related to the grievor's trade union activity. However, this is not a sufficient explanation for the way in which the grievors were treated. We are satisfied that the employer has engaged in a program of continued and systematic harassment designed to make an example of the grievors and penalize them for their support of the trade union. The company hoped to force the employees to quit – as Ms. McMahon eventually did or, alternatively, to mask an illegal discharge in the guise of corrective discipline. In our view this is the real reason why the company took pains to keep a record of what appear to be minor transgressions which other employees committed with impunity; and this is the real reason why the grievors were closely supervised, constantly castigated and continually called to account for their actions. We are satisfied, therefore, that the company has contravened sections 56, 58(a), 58(c), 61 and 71 of *The Labour Relations Act*. Accordingly, the Board orders that:

- 1) the grievor Gail Ouellette be re-instated forthwith to her previous position and compensated for all wages and benefits lost by reason of her illegal discharge;

- 2) the grievor Gail Ouellette be compensated for all wages and benefits lost by reason of her earlier suspension;
- 3) the grievor, Ann Marie McMahon, be offered re-instatement in her former position, and if she accepts, compensation for any economic losses arising from her termination.
- 4) the disciplinary records of both grievors and all documents and notations incidental thereto be removed from their personnel files.
- 5) that the incidents relied upon by the respondent as justifying discipline in these instances shall not be the basis for any future disciplinary action or a consideration in assessing the quantum of any penalty which might otherwise be imposed by reason of a new, *bona fide*, incident of misconduct.

17. The complainant requested that the Board require the respondent, through its management, to issue a formal letter of apology to the grievors. We do not consider that an apology is an appropriate remedy in the circumstances of this case; but we are concerned about the effect that the employer's illegal conduct may have on other employees who have exercised their statutory right to join or support a trade union. It will be recalled that the employees' freedom to support, or not support, a trade union is the very right which the employer stressed in its communications with the employees at the time of the union's organizing campaign; yet it is the right which the employer has prejudiced by its subsequent illegal conduct. We are especially concerned here since it appears that part of the employer's motivation was to remove vocal union adherents and thereby undermine an anticipated organizing campaign. An unsuccessful representation vote simply cannot be allowed to become a signal for employer recriminations, nor is the dismissal of a certification application to be regarded as a licence permitting an employer to "weed out" union supporters. The Board therefore orders that the employer mail, at its own cost and *without comment*, a copy of this decision to each employee in the bargaining unit described in Board File No. 1778-78-R. In our view such order is necessary to dissipate the chilling effect which the respondent's conduct may have on employees who may wish to support a union. In fashioning this remedy we have considered the company's previous communications with the employees, listing the reasons why they should not support a trade union. The Board found that these communications were not illegal but were a legitimate expression of the employer's right of free speech. The Board must be equally scrupulous to protect the rights of employees who choose to support a trade union. In framing our order, therefore, we are satisfied that we should require the same mode of communication as that adopted by the employer on this earlier occasion.

18. The respondent is directed to comply forthwith with the remedial directions set out in paragraphs 16 and 17 hereof. The Board will remain seized in the event there is any difficulty in calculating the quantum of compensation.







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1979

### BARGAINING AGENTS CERTIFIED DURING NOVEMBER

#### No Vote Conducted

**0224-79-R:** Ontario Taxi Association Local 1688 Canadian Labour Congress (Applicant) v. Blue Line Taxi Co. Limited (Respondent).

Unit: "all employees of the respondent licensed as taxi drivers by the Township of Gloucester." (101 employees in the unit). (*Having regard to the agreement of the parties*).

**0334-79-R:** United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Gesco Distributing Limited carrying on business as General Foam and Cushion (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its operations at Concord, save and except supervisors, persons above the rank of supervisor, office staff and sales staff." (56 employees in the unit).

**0383-79-R:** United Steelworkers of America (Applicant) v. Jetcrete Pumps Ltd. (Respondent).

Unit: "all employees of the respondent in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff, persons regularly working not more than twenty-four hours per week and students employed during the school vacation period." (15 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity notes*).

**0602-79-R:** United Garment Workers of America (Applicant) v. Deacon Brothers Limited (Respondent).

Unit: "all employees of the respondent at Belleville, Ontario save and except forepersons and those above the rank of foreperson, head mechanic, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (89 employees in the unit).

**0843-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. The Anderson Company Anderco, Inc. (Respondent).

Unit: "all divers and diver tenders in the employ of the respondents in the District of Rainy River." (4 employees in the unit).

**0846-79-R:** Canadian Union of Public Employees (Applicant) v. Ontario Cancer Treatment and Research Foundation, Thunder Bay Clinic (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in its Thunder Bay Clinic in the City of Thunder Bay, save and except confidential administrative secretary, confidential assistant business manager, depart-

ment heads and persons above the rank of department head, registered and graduate nursing staff and professional medical staff.” (26 employees in the unit). (*Having regard to the agreement of the parties*).

**0922-79-R:** Amalgamated Clothing & Textile Workers Union (Applicant) v. Joncot (Canada) Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Weston, Ontario, save and except foremen, foreladies, persons above the rank of foreman, and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (18 employees in the unit). (*Having regard to the agreement of the parties*).

**1001-79-R:** United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. The Hoover Company Limited (Respondent).

Unit: “all service employees of the respondent at its Hamilton Service Department, save and except foremen, persons above the rank of foreman, office and sales staff.” (2 employees in the unit). (*Having regard to the foregoing*).

**1092-79-R:** International Association of Machinists and Aerospace Workers (Applicant) v. William R. Barnes Co. Limited Minerals Divisions (Respondent).

Unit: “all employees of the respondent employed in the Township of Bathurst save and except lead hands, persons above the rank of lead hands, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (36 employees in the unit). (*Having regard to the agreement of the parties*).

**1108-79-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Lincoln (Respondent).

Unit: “all office, clerical and technical employees of the Town of Lincoln, in the Regional Municipality of Niagara, save and except Department Heads, those above the rank of Department Head, Fire Chief, Town Planner, Secretary to the Public Works Superintendent, Secretary to the Clerk, Deputy-Clerk, Deputy-Treasurer, students employed during the school vacation and on a co-operative basis and those persons regularly employed for not more than twenty-four hours per week.” (13 employees in the unit). (*Having regard to the agreement of the parties*).

**1123-79-R:** United Steelworkers of America (Applicant) v. Reliance Electric Limited Dodge Canada Division (Respondent).

Unit: “all employees of the respondent in Bramalea, Ontario, save and except foremen, persons above the rank of foremen, office, clerical and sales staff.” (45 employees in the unit). (*Having regard to the agreement of the parties*).

**1146-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. E.G.M. Cape & Company Ltd. (Respondent).

Unit: “all employees of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen.” (6 employees in the unit).

**1150-79-R:** Optical and Plastic Technicians and Allied Workers Union Local 67 of U.H.C. & M.W.I.U. (Applicant) v. Plastic Contact Lens Company (Cabada) Ltd. (Respondent).

Unit: "all employees of the respondent employed in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (46 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity notes*).

**1160-79-R:** Toronto Printing Pressmen & Assistants' Union Local No. 10 Subordinate to: International Printing and Graphic Communications Union (Applicant) v. Kohl & Madden Printing Ink Company of Canada Limited (Respondent).

Unit: "all employees of the employer in Metropolitan Toronto save and except non-working foremen, persons above the rank of non-working foremen and office and sales staff." (6 employees in the unit).

**1165-79-R:** Teamsters Local Union 1000, Brewery, Soft Drink, Distillery Distributors and Miscellaneous Workers, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Flangeklamp of Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff." (31 employees in the unit).

**1194-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Gary Broman, Contractor (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1281-79-R:** Service Employees Union, Local 268 (Applicant) v. Sault Ste. Marie Hospital (Respondent).

Unit: "all lay employees of the Sault Ste. Marie General Hospital, in Sault Ste. Marie, Ontario, in the District of Algoma, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer, office and clerical staff and persons covered by subsisting collective agreements." (69 employees in the unit).

**1308-79-R:** Canadian Transportation Workers Union No. 188, National Council of Canadian Labour (Applicant) v. Livingston Transportation Limited (Respondent).

Unit: "all employees of the respondent in its Maintenance Department in the City of Chatham, save and except foremen, persons above the rank of foremen, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and persons covered by subsisting collective agreements." (8 employees in the unit). (*Having regard to the agreement of the parties*).

**1312-79-R:** Service Employees Union, Local 204 Affiliated with the A.F. of L., C.I.O. and C.L.C. (Applicant) v. Bestview Holdings Limited (Respondent).



Unit: "all employees of Bestview Holdings Limited employed at Bestview Lodge Nursing Home in Oshawa who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors and persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements." (8 employees in the unit). (*Having regard to the agreement of the parties*).

**1313-79-R:** International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, (UAW) (Applicant) v. AVP Extrusions Limited (Respondent).

Unit: "all employees of the respondent in Newcastle, Ontario, save and except supervisors, foremen, persons above the rank of supervisor and foreman, office and sales staff." (20 employees in the unit). (*Having regard to the agreement of the parties*).

**1319-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. F.C.M. Construction Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers employed by F.C.M. Construction Limited in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foremen." (5 employees in the unit).

**1320-79-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. CIP Victoria Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at and out of Metropolitan Toronto, save and except foremen, and those above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in the unit).

**1331-79-R:** Canadian Union of Public Employees (Applicant) v. St. Catharines Association for the Mentally Retarded (Respondent).

Unit: "all employees of the respondent in the City of St. Catharines, save and except Managers, persons above the rank of Manager, Supervisor of St. Catharines Learning Centre, Bookkeeper of St. Catharines Association for the Mentally Retarded, Bookkeeper for Residential Services, Confidential Secretary to the Workshop Manager, Confidential Secretary to the Executive Director, persons covered by subsisting collective agreement and Ontario Labour Relations Board Certificate File #0055-79-R)." (22 employees in the unit). (*Having regard to the agreement of the parties*).

**1336-79-R:** International Union of Operating Engineers Local 793 (Applicant) v. Kast Engineering and Construction Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Counties of Brant and Norfolk engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (10 employees in the unit).

**1339-79-R:** The Hotel & Club Employees' Union Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.L.C.-C.I.C.) (Applicant) v. Monarch Steakhouse Restaurant and Tavern (Respondent).

**Unit #1:** “all employees of the respondent at Rexdale, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, audit department, managers, entertainers and persons regularly employed for not more than twenty-four hours per week.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

**Unit #2:** “all employees of the respondent at Rexdale, Ontario regularly employed for not more than twenty-four hours per week, save and except supervisors, persons above the rank of supervisor, office and sales staff, audit department, managers and entertainers.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1343-79-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Carmor Manufacturing Ltd. (Respondent).

**Unit:** “all employees of the respondent at London, Ontario, save and except foreman, and those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (34 employees in the unit). (*Having regard to the agreement of the parties*).

**1344-79-R:** Labourers International Union of North America, Local 837 (Applicant) v. Calorific Construction Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. Ironworkers Locals 700, 721, 736, 765, 786 & 759 of the Ironworkers District Council of Ontario (Intervener #2).

**Unit:** “all construction labourers in the employee of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foremen.” (4 employees in the unit).

**1349-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Adam Holdings Ltd. (Respondent).

**Unit:** “all construction labourers in the employ of the respondent in Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

**1355-79-R:** Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Society of Goodwill Services (Toronto) (Respondent).

**Unit:** “all employees of the respondent in Metropolitan Toronto save and except foremen, and those above the rank of foreman, office, clerical and professional staff, handicapped persons who would be qualified for exemption pursuant to Section 24 of The Employment Standards Act, persons employed pursuant to the Rehabilitation program, homeworkers, persons employed in the Contracting Division and the Retail Division, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement.” (82 employees in the unit). (*Having regard to the agreement of the parties*).

**1357-79-R:** Canadian Union of Public Employees (Applicant) v. The Prescott and Russell County Roman Catholic Separate School Board Le Conseil des Ecoles Catholiques de Prescott-Russell (Respondent).

Unit: "all office, clerical, maintenance and technical employees of the respondent at L'Original, Ontario, save and except assistant directors, persons above the rank of assistant director and persons covered by a subsisting collective agreement between the respondent and the Canadian Union of Public Employees and its Local 2121." (27 employees in the unit).

**1363-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 735 Queenston Road, in the City of Hamilton save and except hostesses and persons above the rank of hostess." (54 employees in the unit). (*Having regard to the agreement of the parties*).

**1364-79-R:** Canadian Union of Restaurants & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 1180 Upper James Street in the City of Hamilton, save and except hostesses and persons above the rank of hostess." (52 employees in the unit). (*Having regard to the agreement of the parties*).

**1368-79-R:** United Steelworkers of America (Applicant) v. Hamilton Mobile Wash Company Limited (Respondent).

Unit: "all employees of the respondent company in Stoney Creek, save and except foremen, persons above the rank of foreman, office and sales staff, all persons regularly employed for not more than twenty-four hours per week and students employed by the respondent during the school vacation period." (85 employees in the unit). (*Having regard to the agreement of the parties*).

**1371-79-R:** Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C. (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning services at the Sir Sandford Fleming College in Peterborough, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*).

**1379-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Beatty-Hall Construction Co. Limited (Respondent) v. Local 598 (298) of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1380-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) Agog Design Consultants Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).



**1382-79-R:** Christian Labour Association of Canada (Applicant) v. Regional Ready Mixed Concrete Co. (Respondent).

Unit: "all employees of the respondent employed in the Township of West Flamborough in the Regional Municipality of Wentworth, save and except foremen, persons above the rank of foremen and office staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1383-79-R:** International Brotherhood of Electrical Workers Local Union 105 (Applicant) v. Carson and Clarke Industrial Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foremen." (5 employees in the unit).

**1384-79-R:** International Union of Allied Novelty and Production Workers, Local 905 (Applicant) v. Regal, Division of General Mills Canada, Ltd. (Respondent).

Unit: "all employees of the respondent at its plant in Metropolitan Toronto, save and except foreman, foreladies, persons above the rank of foremen and forelady, office, clerical and sales staff, students employed for the school vacation period and those regularly employed for not more than 24 hours per week." (165 employees in the unit). (*Having regard to the agreement of the parties*).

**1388-79-R:** Oil, Chemical & Atomic Workers International Union (Applicant) v. St. Clair Paint & Wallpaper A Partnership Operated by St. Clair Paint Limited and St. Clair Wallpaper Limited (Respondent).

Unit: "all employees of the respondent at its plant and warehouses in the Municipality of Toronto, save and except foremen and persons above the rank of foreman, office and clerical staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (38 employees in the unit). (*Having regard to the agreement of the parties*).

**1389-79-R:** Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Alpha Nursing Home Limited (Respondent).

Unit: "all employees of Alpha Nursing Home Limited in Metropolitan Toronto, Ontario, save and except professional nursing staff, physiotherapists, occupational therapist, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

**1397-79-R:** Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 1206 Dundas Street East, in the Town of Whitby, in the Regional Municipality of Durham, save and except hostesses and persons above the rank of hostess." (61 employees in the unit). (*Having regard to the agreement of the parties*).

**1401-79-R:** International Union of Operating Engineers Local 793 (Applicant) v. Beaver Construction (Ontario) Limited (Respondent).

Unit: "all employees of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton engaged in the operation of cranes, shovels, bulldozers and similar equipment,

and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen.” (9 employees in the unit).

**1402-79-R:** Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O. and C.L.C. (Applicant) v. Canada Catering Co. Limited (Respondent).

Unit: “all employees of Canada Catering Co. Limited employed at Thompson House, in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

**1410-79-R:** International Association of Bridge, Structural and Ornamental Iron Workers – Local Union #700 (Applicant) v. Slegers Machining and Fabricating Inc. (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices of the respondent engaged on construction projects in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foremen (5 employees in the unit).

**1424-79-R:** Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff, and cashiers employed by the Respondent at 269 Rexdale Blvd., in the City of Toronto, in the Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess.” (56 employees in the unit). (*Having regard to the agreement of the parties*).

**1425-79-R:** Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, Carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 2422 Fairview Street, in the City of Burlington, in the Regional Municipality of Halton, save and except hostesses and persons above the rank of hostess.” (52 employees in the unit). (*Having regard to the agreement of the parties*).

**1426-79-R:** Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, Carryng on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 267 Weber Street, in the City of Waterloo, in the Regional Municipality of Waterloo, save and except hostesses and persons above the rank of hostess.” (43 employees in the unit). (*Having regard to the agreement of the parties*).

**1427-79-R:** Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, Carryng on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 6666 Lundy Lane, in the City of Niagara Falls, in the Regional Municipality of Niagara, save and except hostesses and persons above the rank of hostess.” (43 employees in the unit). (*Having regard to the agreement of the parties*).

**1427-79-R:** Canadian Union of Restaurant & Related Employees (Applicant) v. Foodcorp Limited, Carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the Respondent at 1415 Yonge Street, in the City of Toronto, in the Regional Municipality of Metropolitan Toronto, save and except hostesses and persons above the rank of hostess." (44 employees in the unit). (*Having regard to the agreement of the parties*).

**1430-79-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Flanagan Warehousing & Distribution Co. Ltd. (Respondent).

Unit: "all employees of the respondent working at Chatham, Ontario, save and except supervisors, those above the rank of supervisor, sales staff and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

**1431-79-R:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helper of America (Applicant) v. Western Dispatch Inc. (Respondent).

Unit: "all employees of the respondent working at or out of the Regional Municipality of Niagara, save and except supervisors, and those above the rank of supervisor." (6 employees in the unit). (*Having regard to the agreement of the parties*).

**1438-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Dabosa Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in the unit).

**1445-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 25 San Romanoway, Downsview, including resident superintendent, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

**1448-79-R:** International Molders and Allied Workers Union (Applicant) v. E.B. Loose Leaf Limited (Respondent).

Unit: "all employees of the respondent at Weston, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (47 employees in the unit). (*Having regard to the agreement of the parties*).

**1453-79-R:** Canadian Union of Public Employees (Applicant) v. The Board of Education for the Borough of East York (Respondent) v. Local 3219 United Brotherhood of Carpenters and Joiners of America (Intervener #1) v. The Association of Professional Student Services Personnel (Intervener #2) v. Group of Employees (Objectors).



Unit: "all office, clerical and technical employees of the respondent, employed in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements between the respondent and Canadian Union of Public Employees, Local 463, United Brotherhood of Carpenters and Joiners of America and the Association of Professional Student Services Personnel, Schedule II Association members, Secretary to the Director of Education & Secretary-Treasurer, Secretary to the Superintendent of Operations, Secretary to the Superintendent of Business, Secretary to the Superintendent of program, Secretary to each of the Assistant Superintendents (3), Secretary to the Personnel Officer, Secretary to the Manager of Plant, Secretary to the Assistant Superintendent of Business, Senior Accounting Clerk (Payroll), Assistant to the Accounting Supervisor, Senior Key punch Operator, Senior Computer Operator, students, lay assistants, para-professionals, swimming instructors and lifeguards." (101 employees in the unit). (*Having regard to the agreement of the parties*).

**1457-79-R:** Canadian Union of Public Employees (Applicant) v. The Wentworth County Board of Education (Respondent).

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Hamilton-Wentworth, Ontario, save and except supervisors, persons above the rank of supervisor, administrative assistants, the purchasing agent, the accountant, the secretary to the director of education, the secretary to the superintendent of business and finance and employees cover by existing collective agreements." (107 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity notes*).

**1467-79-R:** Labourers' International Union of North America, Local 1081 (Applicant) v. K. and K. Developments Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1470-79-R:** United Glass and Ceramic Workers of North America, AFL-CIO-CLC (Applicant) v. Lukian Plastic Closures Ltd. (Respondent).

Unit: "all employees of the respondent at Oakville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in the unit).

**1472-79-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Women's Christian Association of London (Respondent).

Unit: "all employees of The McCormick Home for the Aged (owned and operated by The Women's Christian Association of London) regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, housekeeper, foreman, professional medical staff, graduate and undergraduate nurses and office staff." (33 employees in the unit).

**1474-79-R:** Labourers' International Union of North America, Local 837 (Applicant) v. Daniela Constr. Co. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ni-

agara and the County of haldimand, save and except non-working foremen and persons above the rank of non-working foremen.”(4 employees in the unit).

**1489-79-R:** Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Goldie-Buirgess Limited (Respondent).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

**1494-79-R:** Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Bertrand & Freres Construction Co. Ltd. (Respondent).

Unit: “all maintenance employees of the respondent working at L’Original, Ontario, County of Prescott, save and except foremen, and those above the rank of foremen, office and sales staff.” (11 employees in the unit). (*Having regard to the agreement of the parties*).

**1500-79-R:** Bricklayers, Stonemasons & Tilesetters Union, Local No. 2 Ontario, affiliated with The International Union of Bricklayers & Allied Craftsmen (Applicant) v. 408419 Ontario Limited cob as Action Masonry (Respondent).

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foremen.” (5 employees in the unit).

**1502-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Beer Construction Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foremen.” (2 employees in the unit).

**1508-79-R:** Canadian Food & Allied Workers, Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Valdi Inc. (Trading as Valdi Discount Foods) (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in its stores in St. Catharines, Ontario, save and except the assistant store manager and persons above the rank of assistant store manager.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

**1511-79-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. The Metropolitan Trust Company (Respondent)

Unit: “all employees of the respondent engaged in cleaning and janitorial work at 31 and 35 St. Denis Drive, Don Mills, Ontario including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

**1528-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Capform Inc. (Respondent).

Unit: "all employees of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowns, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in the unit).

**1536-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Bathurst-Prue Developments Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasters, non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1537-79-R:** Labourers' International Union of North America, Local 506 (Applicant) v. Buttcon Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasters, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1547-79-R:** Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.C.-C.L.C.) (Applicant) v. The Inn on the Park Hotel (Respondent).

Unit: "all cashiers of the respondent in its food and beverage department at The Inn on the Park Hotel, Don Mills, Ontario, save and except those cashiers in its food and beverage department that are presently covered by the existing collective agreement between the applicant and the respondent." (11 employees in the unit). (*Having regard to the agreement of the parties*).

**1560-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Rumble Contracting Ltd. (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (4 employees in the unit).

**1561-79-R:** United Brotherhood of Carpenters & Joiners of America, Local 18 (Applicant) v. Newman Bros. Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of



Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the Count of Halton, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

**1591-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Dynamo Servicing (London) Inc. (Respondent).

Unit: "all employees of the respondent working in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foremen." (11 employees in the unit).

### Applications Certified Subsequent to Pre-Hearing Vote

**0187-79-R:** Canadian Union of Public Employees (Applicant) v. Carleton University (Respondent).

Unit: "all employees of the respondent in Ottawa employed as teaching assistants, demonstrators, part-time or sessional lecturers, markers, research assistants or associates and service assistants who are graduate students enrolled in the Faculty of Graduate Studies or Undergraduate students at Carleton University excluding employees covered by collective agreements with Canadian Guard Association, Local 103; Canadian Union of Public Employees, Local 910, I.U.O.E., Local 796; Graphic Arts International Union, Local 224; Carleton University Support Staff Association and the Carleton University Academic Staff Association." (866 employees in the unit).

Number of persons on revised voters' list		632
Number of persons who cast ballots		382
Number of ballots segregated and not counted	67	
Number of spoiled ballots	1	
Number of ballots marked in favour of the applicant	246	
Number of ballots marked against the applicant	68	

**1239-79-R:** Oil, Chemical & Atomic Workers International Union (Applicant) v. Ethyl Canada Inc. (Respondent) v. Employee Association of Ethyl (Intervener).

Unit #1: "all permanent non-supervisory employees of the respondent in Maintenance, Operations, Laboratory and Stores at the Sarnia Plant." (98 employees in the unit).

Number of names of persons on revised voters' list		133
Number of persons who cast ballots		121
Number of ballots marked in favour of the applicant	64	
Number of ballots marked in favour of the intervener.	57	

Unit #2: "all employees of the respondent at its Sarnia Plant save and except permanent non-supervisory employees in Maintenance, Operations, Laboratory and Stores; foremen and supervisors; persons above the rank of foreman and supervisor; clerical, office and sales staff; professional and technical staff (Laboratory Control Analysts and Engineering Technologists); security guards; employees regularly employed for not more than 24 hours per week; students employed during vacation period and students employed under cooperative education programs." (63 employees in the unit).

Number of names of persons on revised voters' list		23
Number of persons who cast ballots		20
Number of ballots marked in favour of the applicant	14	
Number of ballots marked against the applicant	6	

**1282-79-R:** Service Employees Union, Local 204, Affiliated with A.F. of L. C.I.O. and C.L.C. (Applicant) v. Toronto East General and Orthopaedic Hospital Inc. (Respondent).

Unit: "all office and clerical employees of the Toronto East General and Orthopaedic Hospital Inc. in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except persons classified as accountant, assistant comptroller, office manager and assistant office manager in radiology, chief switch-board operator, senior clerk in information, nursing staffing assistant, assistant purchasing agent, chief admitting officer, payroll officer, deputy payroll officer, personnel manager, assistant personnel manager, persons employed in the personnel office in a confidential capacity relating to labour relations, registered medical records librarians, librarians in doctor's library, secretary to the Executive Director, Associate Director, Assistant Director, Medical Director, Director of Finance and Director of Nursing, and persons covered by subsisting Collective Agreements with C.U.O.E. Local 101, O.N.A., O.P.S.E.U. Local 576, S.E.U. Service Local 204, and S.E.U. Clerical Local 204 and supervisors and persons above the rank of supervisor." (62 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		61
Number of persons who cast ballots	25	
Ballots segregated and not counted	2	
Number of ballots marked in favour of applicant	22	
Number of ballot marked against applicant	1	

**1412-79-R:** Service Employees Union, Local 204, Affiliated with A.F. of L. C.I.O. and C.L.C. (Applicant) v. Ascension Charitable Foundation Inc. (Respondent)

Unit: "all employees of the respondent at Thompson House Home for the Aged in the City of North York, save and except Registered Nurses, Physiotherapists, Occupational Therapists, Supervisors, persons above the rank of Supervisor, Office Staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (49 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	32	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	9	

### Application Certified Subsequent to Post-Hearing Vote

**1063-79-R:** The Canadian Union of Public Employees (Applicant) v. Windsor Association for the Mentally Retarded (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except teaching supervisors, group home supervisors, janitorial supervisor, programme co-ordinators, managers and superintendents; those above the rank of teaching supervisor, group home supervisor, janitorial supervisor, programme co-ordinator, manager and superintendent; office and clerical staff; persons employed in a vocational training programme; persons employed on temporary projects financed in whole or in part by Government funding; persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (42 employees in the unit).

Number of persons on revised voters' list		43
Number of persons who cast ballots	43	
Number of ballots marked in favour of the applicant	33	
Number of ballots marked against the applicant	10	

## APPLICATIONS FOR CERTIFICATION DISMISSED

### No Vote Conducted

**1260-78-R:** Christian Trade Unions of Canada (Local 6) (Applicant) v. Per-fec-tion Insulations Ltd. (Respondent). (4 employees).

**1769-78-R:** Christian Trade Unions of Canada (Local 6) (Applicant) v. Per-fec-tion Insulations Ltd. (Respondent). (3 employees).

**0184-79-R:** United Steelworkers of America (Applicant) v. Westeel-Rosco Company Limited (Respondent).

Unit: "all employees in Metropolitan Toronto save and except foremen, those above the rank of foreman, office and sales staff, and those engaged in outside erection work." (7 employees in the unit).

**0805-79-R:** United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lowes Lumber and Furniture Ltd. (Respondent).

**0827-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Dranco Construction Company Limited (Respondent). (60 employees).

**0906-79-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Brentview Construction Limited (Respondent). (40 employees).

**1148-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Delmar Paving Limited (Respondent). (3 employees).

**1180-79-R:** Graphic Arts International Union, Local 12-L (Applicant) v. Ronald's Printing, A Division of Ronalds-Federated Limited (Respondent). (8 employees).

**1337-79-R:** Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #1) v. The Association of Professional Student Services Personnel (Intervener #2). (17 employees).

**1338-79-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Carlingwood Shopping Centres Limited (Respondent). (9 employees).



**1422-79-R:** Office and Professional Employees International Union, Local 131 (Applicant) v. A.P. Green Refractories (Canada) Ltd. (Respondent). (33 employees).

**1429-79-R:** Labourer's International Union of North America, Local 506 (Applicant) v. Buttcon Limited Contractors and Engineers (Respondent). (2 employees).

**1495-79-R:** United Plant Guard Workers of America, Local 1962 (Applicant) v. McDonnell Douglas Canada Ltd. (Respondent) v. Canadian Guards Association (Intervener). (17 employees).

**1551-79-R:** Canadian Union of General Freight Handlers (IND.) (Applicant) v. Shuntmaster Limited (Respondent). (19 employees).

### **Certification Dismissed Subsequent to Post-Hearing Vote**

**1034-79-R:** United Steelworkers of America (Applicant) v. A.J. Clarke and Associates Limited (Respondent).

Unit: "all employees of the respondent in Hamilton, save and except managers, persons above the rank of manager, office, clerical, technical and sales staff, professional engineers, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (38 employees in the unit).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots		38
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	28	

### **APPLICATIONS FOR CERTIFICATION WITHDRAWN**

**0193-79-R:** Construction Workers Local No. 6 Affiliated with the Christian Labour Association of Canada (Applicant) v. Merrill Electric (Respondent). (2 employees).

**0650-79-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Franki Canada Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener). (4 employees).

**0991-79-R:** Laundry, Dry Cleaning and Dye House Workers International Union, Local 351 (Applicant) v. Four Seasons Hotel Belleville (Respondent). (140 employees).

**1352-79-R:** Labourer's International Union of North America, Local 506 (Applicant) v. The Ram-Land Corporation Limited (Respondent). (2 employees).

**1366-79-R:** Labourer's International Union of North America, Local 493 (Applicant) v. Franki Canada Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener). (2 employees).

**1400-79-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local

Union 721 (Applicant) v. Giffin Sheet Metals Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local Union #30 (Intervener). (12 employees).

**1436-79-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. O'Brien Contracting Inc. (Respondent). (2 employees).

**1466-79-R:** United Association Of Journeymen and Apprentices Of The Plumbing and Pipe Fitting Industry Of The United States And Canada Local Union 508 (Applicant) v. Lukes Industrial Services Limited (Respondent). (11 employees).

**1492-79-R:** Labourer's International Union of North America, Local 183 (Applicant) v. Mac Land Wall Systems (Respondent). (12 employees).

**1585-79-R:** Labourer's International Union of North America, Local 183 (Applicant) v. Demi Concrete And Drain Limited (Respondent). (12 employees).

**1586-79-R:** Labourer's International Union of North America, Local 493 (Applicant) v. Cooper Construction Co. Ltd. (Respondent). (10 employees).

**1599-79-R:** Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of Brant (Respondent). (61 employees).

**1607-79-R:** Labourer's International Union of North America, Local 183 (Applicant) v. Cliffside Court Housing Co-Operative Inc. (Respondent). (5 employees).

**1628-79-R:** Canadian Union of Public Employees (Applicant) v. University Settlement House (Respondent). (7 employees).

**1652-79-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Mollenhauer Limited Contractors & Engineers (Respondent). (2 employees).

**1673-79-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Loals 27, 666, 681, 1133, 1304, 1963, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Xila Inc. (Respondent). (3 employees).

## APPLICATIONS UNDER SECTION 1(4)

**1478-79-R:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Harrington Plumbing & Heating Ltd. and MacDonald Brothers Excavating Contractors (Respondent). (*Withdrawn*).

**1479-79-R:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. J. G. Rivard Limited and Michel Rivard Plumbing Limited (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1284-78-R:** VS Services Ltd., 119 St. Clair Street, Chatham, Ontario. N7L 3J2 (Applicant) v. Teamsters Local No. 647 (Respondent). (3 employees). (*Granted*).

**0175-79-R:** Garry William Gilbert (Applicant) v. Christian Labour Association of Canada (Respondent) v. Lakeview Sheet Metal (Orillia) Limited (Intervener). (*Granted*).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of Lakeview Sheet Metal (Orillia) Limited in the County of Simcoe, The District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Ballots segregated and not counted	1	
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	2	

**1341-79-R:** Shirley Orum and Linda Toronyi (Applicant) v. The Hotel and Restaurant Employees' Union Local 743, Affiliated with the Hotel and Restaurant Employees and Bartenders International Union, W. and D.L.C. and C.L.C. (Respondent). (115 employees). (*Withdrawn*).

**1506-79-R:** United Steelworkers of America (Applicant) v. McNamara Marine, Division of McNamara Corporation of Newfoundland Limited (*Withdrawn*).

## APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

**1559-79-R:** Local 636, International Brotherhood of Electrical Workers (Applicant) v. The Tilbury Public Utilities Commission (Respondent). (*Granted*).

## APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

**1022-79-U:** Electrical Power Systems Construction Association (Applicant) v. D. W. McIntyre and J. Carruthers on their own behalf and on behalf of the Ontario Allied Construction Trades Council, H. W. Ingham, J. F. Kennedy, P. A. Gauthier, G. A. McLeod on their own behalf and on behalf of the International Union of Operating Engineers and on behalf of its Local 793, Leonard Schultz on his own behalf and on behalf of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local Union 879, Bryon Black on his own behalf and on behalf of the United Brotherhood of Carpenters and Joiners of America and its Local 2222, Russell Tambeau, Nelson Lewis and all those persons named in Attachment "A" (Respondents). (*Granted*).

**1523-79-U:** Adam Holdings Ltd. (Applicant) v. Labourers' International Union of North America Local 506, David Off, Michael O'Brien and Alfredo Antonialli (Respondent). (*Withdrawn*).

**1604-79-U:** Community Nursing Homes Limited (Applicant) v. Salvatore Guido and Others as Listed



on Schedule “A”, Nick Tansella, Labourers’ International Union of North America Local 183 and Labourers’ International Union of North America, Local 506 (Respondent). *(Withdrawn)*.

## **APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL**

**1565-79-U:** International Association of Machinists and Aerospace Workers, District Lodge 717 (Applicant) v. Hawker Siddeley Canada Ltd. Forestry Equipment Division (Respondent). *(Withdrawn)*.

**1566-79-U:** International Association of Machinists and Aerospace Workers, District Lodge 717 (Applicant) v. Hawker Siddeley Canada Ltd. Forestry Equipment Division (Respondent). *(Withdrawn)*.

## **APPLICATIONS FOR CONSENT TO PROSECUTE**

**2049-78-U:** Ontario Public Service Employees Union (Applicant) v. Mohawk College of Applied Arts and Technology and Dr. Samuel Mitminger (Respondents). *(Withdrawn)*.

**2053-78-U:** Ontario Public Service Employees Union (Applicant) v. Georgian College of Applied Arts and Technology and Peter Pass (Respondents). *(Withdrawn)*.

**2057-78-U:** Ontario Public Services Employees Union (Applicant) v. Humber College of Applied Arts and Technology and Gordon Wragg (Respondents). *(Withdrawn)*.

**2059-78-U:** Ontario Public Service Employees Union (Applicant) v. Confederation College of Applied Arts and Technology and Bert Curtis (Respondents). *(Withdrawn)*.

**2152-78-U:** Ontario Public Service Employees Union (Applicant) v. Board of Governors of Durham College of Allied Arts and Technology (Respondent). *(Dismissed)*.

**1241-79-U:** Retail Clerks Union, Local 206 (Chartered by the Retail Clerks International Union) (Applicant) v. V.S. Services Ltd. (Respondent). *(Withdrawn)*.

**1246-79-U:** Canadian Chemical Workers Union (Applicant) v. Sheffield Bronze Powder Co. Limited (Respondent). *(Dismissed)*.

**1518-79-U:** Lewis Insulations Services Inc. (Applicant) v. J. Duffy (Respondent). *(Withdrawn)*.

**1519-79-U:** Lewis Insulations Services Inc. (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent). *(Withdrawn)*.

## COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

**2048-78-U:** Ontario Public Service Employees Union (Complainant) v. Canadore College of Applied Arts and Technology and Dr. Murray Hewgill (Respondents). (*Withdrawn*).

**2056-78-U:** Ontario Public Service Employees Union (Complainant) v. Lambton College of Applied Arts and Technology and George Delgrosso (Respondents). (*Withdrawn*).

**0084-79-U:** Canadian Union of Public Employees (Complainant) v. The Board of Management of the District of Thunder Bay Home for the Aged (Pinewood Court) (Respondent). (*Withdrawn*).

**0096-79-U:** Clark Millaire (Complainant) v. Canadian Guards Association, Local 105, K. B. Watts, R. Tracy, R. O'Brien, R. Butler (Respondents) v. Inco Metals Company (Interested Party) (*Dismissed*).

**0392-79-U:** United Rubber, Cork, Linoleum & Plastic Workers of America (hereinafter referred to as the "U.R.W.") (Complainant) v. Gesco Distributing Limited carrying on business as General Foam and Cushion (Respondent). (*Dismissed*).

**0525-79-U:** Retail Clerks, Local 206 (Complainant) v. Zellers (Respondent). (*Withdrawn*).

**0526-79-U:** Retail Clerks, Local 206 (Complainant) v. Zellers (Respondent). (*Withdrawn*).

**0527-79-U:** Retail Clerks, Local 206 (Complainant) v. Zellers (Respondent). (*Withdrawn*).

**0528-79-U:** Retail Clerks, Local 206 (Complainant) v. Zellers (Respondent). (*Withdrawn*).

**0755-79-U:** Gordon F. D'Eri (Complainant) v. T.I.A. Limousine Operators Association (Respondent). (*Dismissed*).

**0768-79-U:** The United Brotherhood of Carpenters & Joiners of America Local Union 1669 (Complainant) v. West York Construction Ltd. (Respondent). (*Withdrawn*).

**0786-79-U:** Ontario Nurses' Association (Complainant) v. Wellington-Dufferin-Guelph Health Unit (Respondent). (*Granted*).

**0923-79-U:** Theophilus Anderson (Complainant) v. Laborers International Union of North America, Local 506, Laborers International Union of North America, Ontario Hydro (Respondents). (*Dismissed*).

**1012-79-U:** James Lucas (Complainant) v. International Union of Operating Engineers, Local 793 and The Corporation of the County of Hastings (Respondents). (*Granted*).

**1029-79-R:** Toronto Typographical Union No. 91 (Complainant) v. Goldcraft Printers Ltd. (Respondent). (*Granted*).

**1036-79-U:** Clara Smith and Georgia Nicholas (Complainants) v. VS Services Ltd. and Carefree Lodge (Respondents). (*Dismissed*).

**1126-79-U:** Local Union 1590 of the International Brotherhood of Electrical Workers (Complainant) v. Bayly Engineering Limited (Respondent). (*Dismissed*).

**1129-79-U:** Canadian Union of Fast Food and Service Workers (Complainant) v. The Great Canadian Pizza Company (Division of 401825 Ont. Ltd.) (Respondent).

- and -

**1130-79-U:** Canadian Union of Fast Food and Service Workers (Complainant) v. The Great Canadian Pizza Company (Division of 401825 Ont. Ltd.) (Respondent).

- and -

**1176-79-U:** Canadian Union of Fast Food and Service Workers (Complainant) v. The Great Canadian Pizza Company (Division of 401825 Ont. Ltd.) (Respondent). (*Withdrawn*).

**1201-79-U:** Retail Clerks Union, Local 206 (Complainant) v. Zellers Limited (Respondent). (*Withdrawn*).

**1207-79-U:** International Molders & Allied Workers Union (Complainant) v. Rehau Plastiks of Canada Limited (Respondent). (*Dismissed*).

**1317-79-U:** The International Ladies' Garment Workers' Union (Complainant) v. Third Dimension Manufacturing Limited (Respondent). (*Withdrawn*).

**1321-79-U:** United Steelworkers of America (Complainant) v. Aclo Compounders Inc. (Respondent). (*Withdrawn*).

**1322-79-U:** Canadian Union of Public Employees (Complainant) v. Rygiel Home (Respondent). (*Withdrawn*).

**1324-79-U:** International Union of Operating Engineers, Local 793 (Complainant) v. Ayerswood Developments Limited (Respondent). (*Withdrawn*).

**1329-79-U:** Hotel & Club Employees Union, Local 299 (Complainant) v. Monarch Steakhouse Restaurant and Tavern (Respondent). (*Withdrawn*).

**1351-79-U:** United Steelworkers of America (Complainant) v. Fotomat Canada Limited (Respondent). (*Withdrawn*).

**1359-79-U:** Graphic Arts International Union, Local 517 (Complainant) v. Progressive Printing (Respondent). (*Withdrawn*).

**1361-79-U:** Toronto Typographical Union No. 91 (ITU) (Complainant) v. Goldcraft Printers Limited (Respondent). (*Withdrawn*).

**1399-79-U:** Joseph Portelli (Complainant) v. Canadian Food & Allied Workers Local #P114 (Respondent). (*Dismissed*).



**1403-79-U:** Ian D. MacLaughlin (Complainant) v. United Auto Workers Local 1780 (Respondent). *(Withdrawn)*.

**1409-79-U:** International Association of Bridge, Structural and Ornamental Ironworkers Local 834 (Complainant) v. York Steel Company Limited (Respondent). *(Withdrawn)*.

**1434-79-U:** Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Clover Transport Ltd. (Respondent). *(Withdrawn)*.

**1441-79-U:** Hotel & Restaurant Employees and Bartenders Union, Local 604 A.F.L., C.I.O., C.L.C. of the Hotel and Restaurant Employees and Bartenders International Union (Complainant) v. Grand Hotel (Respondent). *(Withdrawn)*.

**1442-79-U:** Hotel & Restaurant Employees and Bartenders Union, Local 604 A.F.L., C.I.O., C.L.C. of the Hotel and Restaurant Employees and Bartenders International Union (Complainant) v. Trent Inn Hotel (Respondent). *(Withdrawn)*.

**1443-79-U:** Hotel & Restaurant Employees and Bartenders Union, Local 604 A.F.L., C.I.O., C.L.C. of the Hotel and Restaurant Employees and Bartenders International Union (Complainant) v. King George Hotel (Respondent). *(Withdrawn)*.

**1459-79-U:** Carlos Pimental (Complainant) v. The Butcher Engineering Enterprises Limited (Respondent). *(Withdrawn)*.

**1460-79-U:** Raymond Hopf (Complainant) v. Millwrights District Council of Ont. and E. Ryan (Respondents). *(Withdrawn)*.

**1481-79-U:** Hotel & Restaurant Employees & Bartenders Union Local 604, AFL., CIO. & CLC (Complainant) v. Montreal House (Respondent). *(Withdrawn)*.

**1483-79-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Simpsons Sears Limited (Respondent). *(Withdrawn)*.

**1510-79-U:** United Steelworkers of America (Complainant) v. Automatic Screw Machine Products, Ltd. Automotive Hardware Limited and Federal Bolt and Nut Corporation Ltd. (Respondent). *(Withdrawn)*.

**1550-79-U:** United Steelworkers of America (Complainant) v. Aclo Compounders Inc. (Respondent). *(Withdrawn)*.

**1568-79-U:** Service Employees' Union, Local 204 (Complainant) v. Ascension Charitable Foundation Inc. (Respondent). *(Withdrawn)*.

## APPLICATION UNDER SECTION 39

**0873-79-M:** Kevin Crow (Applicant) v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, CIO, CLC (Respondent Trade Union) v. Gordons Markets, Division of Zehrmart Limited (Respondent Employer).

- and -

**0900-79-M:** Corinne De Boer (Applicant) v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, CIO, CLC (Respondent Trade Union) v. Gordons Markets, Division of Zehrmart Limited (Respondent Employer).

- and -

**0901-79-M:** Mel De Boer (Applicant) v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, CIO, CLC (Respondent Trade Union) v. Gordons Markets, Division of Zehrmart Limited (Respondent Employer).

- and -

**0902-79-M:** John De Boer (Applicant) v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, CIO, CLC (Respondent Trade Union) v. Gordons Markets, Division of Zehrmart Limited (Respondent Employer). (*Granted*).

## APPLICATIONS UNDER SECTION 55

**1945-78-R:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. R. N. Flynn Insulations Limited and Per-Fec-Tion Insulations Limited (Respondents) v. Construction Workers, Local 6 affiliated with Christian Labour Association of Canada (Intervener). (*Granted*).

**1232-79-R:** Sheet Metal Workers' International Association, Local Union No. 562 (Applicant) v. Galt Roofing & Sheet Metal Company Limited and/or Walden Roofing & Sheet Metal Co. Limited and Galt Roofing and Sheet Metal (Ontario) Limited (Respondents). (*Granted*).

**1245-79-R:** Hotel & Restaurant Employees & Bartenders Union Local 604, A.F.L. - C.I.O. - C.L.C., Peterborough, Ont.; of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Tavana Restaurant Operated by Drita Enterprises Ltd. (Respondent). (*Dismissed*).

**1487-79-R:** International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. M. A. Butt Construction Limited, and Buttcon Limited (Respondent). (*Withdrawn*).

## APPLICATION UNDER SECTION 76 (FINANCIAL STATEMENT REQUESTED BY TRADE UNION MEMBER)

**0619-79-M:** Vernon A Bassue (Complainant) v. Local 2900 U.S.W.A. (Respondent). (*Withdrawn*).

## **APPLICATIONS FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 78**

**2052-78-U:** Ontario Public Service Employees Union (Complainant) v. Durham College of Applied Arts and Technology and Dr. Gordon Willey (Respondents). (*Withdrawn*).

**2153-78-U:** Ontario Public Service Employees Union (Complainant) v. Board of Governors of Durham College of Applied Arts and Technology (Respondent). (*Dismissed*).

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**1517-79-JD:** International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local 128 (Complainant) v. Comstock International Limited Sheet Metal Workers' International Association, Local Union No. 30 (Respondent). (*Withdrawn*).

## **APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82**

**1612-78-M:** Ontario Public Service Employees' Union (Trade Union) v. St. Clair College of Applied Arts and Technology (Employer). (*Granted*).

## **REFERENCE TO BOARD PURSUANT TO SECTION 96**

**0740-79-M:** Groves Park Lodge (Employer) v. Canadian Union of Public Employees and its Local 2103 (Trade Union). (*Granted*).

## **APPLICATIONS UNDER SECTION 112A**

**0665-79-M:** United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Normand & Fleming Ltd. and Fleming & Sotramont Corp. Ltd. and The Carpenters Employer Bargaining Agency (Respondents). (*Granted*).

**1039-79-M:** Local Union 2965, The Resilient Floor Workers, United Brotherhood of Carpenters and Joiners of America A.F.L. - C.I.O. (Applicant) v. Darling Carpet Installations Ltd. (Respondent). (*Granted*).

**1136-79-M:** Local Union 93, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Acto Builders (Eastern) Limited and Acto Construction & Engineering Ltd. (Respondents). (*Dismissed*).

**1203-79-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Maco Construction Company (Respondent). (*Withdrawn*).



**1302-79-M:** Avenue Structures, Chemello Contractors, Hauserman Ltd., Plyform Construction Co. Ltd. and Store Fixtures Unlimited Limited (Applicants) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Respondent) v. Labour Relations Bureau of the Ontario General Contractors Association (Intervener). (*Granted*).

**1396-79-M:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 3227 and 3233 (Applicant) v. H. G. Susgin Construction Limited (Respondent) v. Toronto Construction Association General Contractors Section (Intervener). (*Granted*).

**1398-79-M:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 221 (Applicant) v. Yellow Jacket Welding Co. Ltd. (Respondent). (*Granted*).

**1416-79-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Yellow Jacket Welding (Respondent). (*Granted*).

**1419-79-M:** Sheet Metal Workers' International Association, Local 562 (Applicant) v. Walden Roofing & Sheet Metal Co. Limited, Galt Roofing & Sheet Metal Company Limited, and Galt Roofing and Sheet Metal (Ontario) Limited (Respondents). (*Withdrawn*).

**1451-79-M:** Lake Ontario District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pentagon Construction Canada Inc. and Peterborough District Construction Exchange (Respondents). (*Granted*).

**1462-79-M:** The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. York Millwrighting; The Association of Millwrighting Contractors of Ontario (Respondents). (*Granted*).

**1475-79-M:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. J. G. Rivard Limited (Respondent). (*Withdrawn*).

**1476-79-M:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Harrington Plumbing and Heating Ltd. (Respondent). (*Withdrawn*).

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**1484-79-M:** Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. J. G. Rivard Limited (Respondent). (*Withdrawn*).

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Ontario  
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## ONTARIO LABOUR RELATIONS BOARD

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# ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the  
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